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THE

PRACTICAL REGISTER

IN

CHANCERY.

WITH THE ADDITION OF

THE MODERN CASES,

AND

A COPIOUS INDEX.

By JOHN WYATT,

OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

LONDON:

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ADVERTISEMENT.

THE ſcarcity of the PRACTICAL REGISTER in CHANCERY, and the reputation * it deſervedly bears, have induced me to publiſh the preſent edition; I am not ſo vain as to imagine that the book is now perfect, nor ſo diffident as to ſuppoſe that my labours have been entirely uſeleſs:—Such as it is, I ſubmit it to the candour of the Bar, with the ſame ſentiments as the learned author has expreſſed, and the ſame wiſhes, that "Juſtice and Equity, and the lovers of them, may for ever flouriſh."

JOHN WYATT.

HILARY TERM, 1809.
7, FIGTREE-COURT, TEMPLE.

* See 2 Atk. 22. 2 Bro. 146.

N. B. *The original work is inſerted between brackets.*

PREFACE

TO THE

ORIGINAL WORK.

TO THE

PRACTISERS

IN THE

HIGH COURT OF CHANCERY.

GENTLEMEN,

WHAT was at firſt only intended for private uſe, is now made public for yours.

The compiler hath nothing more to ſay of the performance than that he hath endeavoured to render it uſeful. The manner of applying it, is in your hands; and it is hoped will be for the ſervice of your clients' juſt intereſts, and for your own.

If this courſe be purſued, yours will be the credit and ſatisfaction, and the advantage too in the concluſion: but whoever ſwerves from the great and equitable rule of *doing as he would*

would be done by, or disturbs the order of society by evil practices; however he may succeed for a time, yet in the end will as certainly become the scorn and abhorrence of others, as he is already the contempt and scourge of himself.

Next to the justice due to your clients, or rather as a branch of it, (for *deferre est negare*,) *dispatch* puts in its claim; and is of such consequence, that it is generally less mischievous for a man to lose part of his right than to suffer delay. It is hoped that this collection may in some measure help to remedy the evil; for when the way of proceeding is fairly chalked out, there needs little more than a willing mind to pursue it.

With this freedom, and the tender of my services to your kind acceptance, you have my hearty wishes that justice and equity, and the lovers of them, may for ever flourish.

THE

THE PRACTICAL REGISTER IN CHANCERY.

ABATEMENT.

VIDE

Infant.—Error.
Bill of Revivor.
Subpœna to revive.
Subpœna Scire facias to revive.

[THE death of any of the parties, plaintiffs or defendants, causes an abatement.] Deaths of parties.

[So does the marriage of a feme plaintiff.—Contrà of a feme defendant.] Marriage. 1 Eq. Ca. Ab. 87.

[For it is not reasonable she should hurt the plaintiff by, or take advantage of, her own act.]

[A feme, sole defendant, having a commission to examine witnesses, marries; the witnesses are after examined on that commission; the depositions were ordered to stand.] [Toth. 99.]

If by any means any interest of a party to the suit in the matter in litigation becomes vested in another, the proceedings are rendered defective in proportion as that interest affects the suit; so that although the parties to the suit may remain as before, yet the end of the suit cannot be obtained: and if such a change of interest is occasioned by, or is the consequence of the death of the party whose interest is not determined by his death, or the marriage of a female plaintiff, the Change of Interest. Mitf. Treat. 54.

proceedings become likewise abated or discontinued either in part or in the whole.

Death.
1 Ch. Ca. 77.
1 Eq. Ca. Ab. 1.

Upon the death of a plaintiff, or marriage of a female plaintiff, all proceedings become abated.

Upon the death of a defendant, all proceedings become abated as to that defendant. *Mitf. Treat.* 55.

1 Vern. 318.
4 Vin. 147. pl. 20. 1 Vez. 182.

But upon the marriage of a female *defendant*, all proceedings do not abate, though her husband ought to be named in the subsequent proceedings.

Tenant for life.
Mitf. Treat. 56.

If the interest of a party dying determines, and no person becomes entitled thereupon to the same interest; as in case of a tenant for life, the suit does not abate.

Executor.
2 Vern. 249.
3 Atk. 726.

If the interest of a party dying survives to another; as if a bill be filed by or against trustees or executors, and one dies; or by or against husband and wife, in right of the wife, and the husband dies; or by husband and wife respecting a promise made to both of them, and the wife dies, the proceedings do not abate.—So if a surviving party can sustain the suit, as in the case of several creditors plaintiffs on behalf of themselves and other creditors.

Mitf. 56.

Copartners.

Said, That in a bill by copartners, if one die, the interest survives, and the suit does not abate.—Contrà in a suit against copartners, there, if one dies, the suit abates, and the representatives of the deceased partner must be brought before the Court.

Husband's death.
Mitf. 57.

If upon the death of the husband of a female plaintiff suing in her right, the widow does not proceed in the cause, the bill is abated, and she is not liable to the costs.

2 P. W. 496.

But she *may* proceed without a bill of revivor, for the whole advantage of the proceedings survives to her; and if any judgment has been obtained, even for costs, she will be entitled to the benefit of it.

Marriage,
Godkin v. Earl Ferrers.
Mitf. 57.

So, if a female plaintiff marries pending a suit, and afterwards, before revivor, her husband dies, for then her incapacity to prosecute the suit is removed. But the subsequent proceedings must be in the name and description acquired by the marriage.

Interpleader.
1 Vern. 351.

After a decree on a bill of interpleader, there is generally an end of the suit, as to the plaintiff.

Death.
1 Atk. 291.

Bill by a creditor against Mrs. *Higden*, administratrix of *A.* Mrs. *H.* being a married woman, her husband was made a party, upon her death the suit abated.

If

If a party becomes bankrupt, the suit abates as to him. So if the assignees of a bankrupt die or are removed, the suit abates. *Contrà*, 1 *Atk.* 264. 2 *Anstruther*, 458.

Bankruptcy. 1 Atk. 88. 3d——218. Sellas v. Dawson. 2 Anst. 458. Williams v. Minder, Jan. 1799.

Commission to examine witnesses at *Algiers*, plaintiff died, and the suit abated. But the witnesses being examined there before notice of the plaintiff's death, the examination was held regular, though one of the witnesses was yet living.

Commission to examine witnesses. 3 P. Will. 195.

Sequestration to compel performance of a decree abates by death of plaintiff.—*Sed vide contrà*, 3 *Atk.* 594.

Sequestration. 2 P. Will. 622. 1 Ves. 182.

Information abates by the death of the relator, notwithstanding the Attorney-General is the plaintiff.

Information. Prec. Ch. 13.

Administrator in nature of a guardian to an infant, exhibits a bill on his behalf, pending the suit, the infant comes of age, this abates not the bill. *Per* Lord *Egerton*, Chan.

Administrator. Cary, 30.

Sed vide contrà, where, by infants coming of age, the suit abates.

Infant. Prec. Ch. 175.

If joint-tenants or tenants in common exhibit a bill, and pending the suit, one of them dies, the suit does not abate.

Joint-tenants. 3. Ch. Rep. 66.

Sed quære as to tenants in common, for a right descends to their representatives.

Tenants in common. 1 Eq. Ca. Abr. 2.

ACCOUNT.

VIDE

Reference.
Replication.
Rehearing.

[UPON account before the Master, a defendant may, by his own oath, discharge himself of particular sums under forty shillings.]

Oath parties. 2. Ch. Ca. 249. 1 Vern. 283. 2 Vern. 176.

[But shall not charge another so.]

[Where account was of twenty years standing, the Court ordered the defendant should prove his account by his own oath, for so much as he could not prove by books and cancelled bonds.]

Account of long standing. 1 Ch. Rep. 146

1 Ch. Ca. 127. An account of fourteen years ſtanding admitted to be proved by oath. *Vide* 1 *Vern.* 272.

General expences. The Court will not allow any thing to be placed to the head of general expences, but the party muſt name the particulars.

Entry in account book. 2 Ves. 54. A man's own entry in a book of accounts is allowed as evidence on inquiry before the Maſter, where all papers, *&c.* are to be produced, not as evidence of the demand, but as a claim in his lifetime.

Receiver. Prec. Ch. 535. A receiver to the guardian of an infant, who has his account allowed him by the guardian, ſhall not be obliged to account over again, when the infant comes of age.

Wards of Court. 1 Bro. 56. 1779. Money belonging to wards of the Court cannot be transferred to the Accountant-General to the credit of the cauſe, until the account is taken before the Maſter.

Revivor. Prec. in Ch. 197. 1 P. Will 263. 742. After a decree to account, both parties are actors and may revive.

Account from what time. 2 P. Will. 644. 645. Where one is in poſſeſſion of lands belonging to an infant, if the infant when of age makes out his title, he ſhall have an account of the profits from the firſt accruing of his title, and not from the filing of the bill only.

From what time. 2 P. Will. 645. When the defendant conceals the deeds and writings making out plaintiff's title, he ſhall account for the rents and profits from the time when plaintiff's title accrued.

Decree. 2 Atk. 112. Where the Court by a decree gives directions to a Maſter to examine accounts, and the parties are at liberty to ſurcharge and falſify; they are not merely confined to errors in fact, but they may take advantage likewiſe of errors in law.

Miſtakes and omiſſions. 2 Atk. 113. 119. If there are only miſtakes and omiſſions in a ſtated account, the party objecting ſhall be allowed no more than to ſurcharge and falſify: but where there has been fraud, the whole ſhall be opened, though the ſtated account be of 23 years ſtanding.

Stated account. Where perſons have mutual dealings, ſigning the account is not neceſſary to make it a ſtated account, but it is keeping it a length of time without making an objection, which binds the perſon to whom it is ſent. The delivering up of vouchers is an affirmation, 2 Atk. 252.

that

that the account between the parties was a settled one, but it is not absolutely necessary they should be delivered up at the time the account is settled.

If defendant, by his answer, acknowledge any particular sum due, though he swear that such sum was discharged, yet it is still ground for directing an account. Admissions in the answer. 2 Atk. 254.

Plea of a stated account bad, unless it shews the account was in writing, and what the balance was. Plea stated account. 2 Atk. 399.

Where at law a person is allowed sums under 40*s*. on his oath, he must swear positively and not to his belief only; so under a decree that the person upon an account should be allowed such sums as he swears he has actually expended: he must peremptorily swear to the fact. Party's oath. 2 Atk. 410.

Where the transactions were entangled and of long standing, the Court thought fit to dismiss the bill and leave the plaintiff to his action at law, rather than direct an account before the Master. Account of long standing. 2 Atk. 610.

When the sum is large and the mortgagee forced to enter upon the estate, he subjects himself to an account; but the Master is not obliged for a small excess of interest to apply it to sink the principal, nor is it an invariable rule, that in taking such accounts, he must make annual rests. Rests in taking accounts. 2 Atk. 534.

A Master in taking an account may state special matter, though he has no express direction from the decree to do it. Master may report special matter. 2 Atk. 621.

In decrees against mortgagees on bills for redemption, or against executors to account, it is the course of the Court to direct it without future words; and yet, if the persons decreed to account receive any thing subsequent to the decree, it may be inquired of before the Master, and they must bring such things to account. Mortgagees. 3 Atk. 582.

A mortgagor in possession is not liable to account for the rents and profits to the mortgagee; for he ought to take the legal remedy to get into possession. 3 Atk. 244.

Dowress on taking an account, being entitled to allowance for dower, shall not be driven to her writ of dower for future profits. Dowress. 1 Ves. 262.

Account taken by tenant for life shall be binding upon any remainder-man, when his title afterwards vests, and he shall only be allowed to surcharge and falsify; unless fraud: so in an account of mortgages, Tenant for life. 1 Ves. 164.

where all, who could claim the equity of redemption, were parties.

Merchant. 2 Ves. 239.

If one merchant sends an account current to another in a different country, on which a balance is made due to himself, the other keeps it by him two years without objection; the rule is, that it is considered as a stated account.

Stat. limitations. 2 Ves. 485.

Offer to account will take a case out of the statute of limitations.

Surcharge. 2 Ves. 566.

The *onus probandi* is always upon the party having liberty to surcharge and falsify; for the Court takes the account as stated and establishes it: but if any party can shew an omission, for which credit ought to be given, that is a surcharge; if any wrong charge inserted, he is at liberty to shew it; but it must be by proof on his side.

Settled account of long standing. 2 Bro. 62.

Account settled 10 years before the bill filed, though containing very gross items, shall not be opened; but the plaintiff permitted to surcharge and falsify.

In what cases defendant is to set out the account. 3 Bro. 483. Note to the above case. Vide Amb. 353.

Where an account is incidental to plaintiff's title defendant must set it out.

Otherwise where the title is separate from the account; as where bill stated a partnership to have existed between plaintiff and defendant, and required defendant to set forth an account, defendant denied the partnership and did not set forth any account, and on exceptions the Court thought his answer was sufficient.

Executors to account annually. Amb. 406.

Acting executor, to whom the produce of an estate in *Antigua* belonging to an infant was consigned, directed to account annually upon affidavit.

Between the King and a subject. 2 Atk. 56.

Account between the King and a subject cannot be in any case taken in this Court, but only in the Exchequer.

Cross bill. 2 Atk. 60.

Where a bill prays an account against defendant, and allowances in that account, defendant is as proper to make objections, as if he had filed a cross bill to set the allowances aside.

Partnership. 2 Atk. 159.

The Court will not support items in a book of account, which relate to the particular interest of an officer deputed by the partners to keep the general book of account, separate from the partnership affairs.

Hearing. Cur. Can. 341, 342.

Accounts not usually examined to before hearing, but after hearing before a Master, if the witnesses be in town, &c.

&c. but if they are not, then by a commiſſion to be directed by the Maſter, upon an order for his being armed with a commiſſion, though by order 27th *February* 1667 he is always armed to that purpoſe.

Any creditor may obtain an order for proſecuting a decree to account. Creditor. 2 Ves. J. 165.

Said by his Honor, That the Maſter, if he pleaſe, may proceed *de die in diem* in taking an account, without an order for that purpoſe; that he may adjourn at pleaſure; and that the parties are bound to attend without being ſerved with freſh warrants. *Hil.* 1799.

AFFIDAVITS

[ARE commonly uſed for certifying the ſervice of proceſs or orders or ſomething relating to them, or to the proceedings in the cauſe.] When uſed. [2 Toth. 32. 3 Prax. Alm. 17. Com. Sol. 45.]

[By ancient order, no affidavit ſhall be taken againſt affidavit, ſo far as the Maſter in Chancery can diſcern or take knowledge: and this is ſaid to have been for the avoiding manifeſt perjury: and if ſuch were taken, the latter affidavit was not to be read or uſed; but the party was left to his remedy againſt the former deponent for perjury, if he ſee cauſe. The practice now ſeems to be otherwiſe.] [3 Prax. Alm. 17.]

[By ancient rule, no affidavit ſhall be admitted or taken, tending to the proof or diſproof of the title or matter in queſtion, or touching the merits of the cauſe; nor ſhall any ſuch matter be colourably inſerted in any affidavit of ſervice of proceſs, *&c.*] [Toth 32.]

[Affidavits are ſworn before a Maſter of the court, or before a Maſter extraordinary in the country: but the latter is not to take any in *London* or within 20 miles of it.] How ſworn.

[Every Maſter extraordinary, ſhall, at the bottom of every affidavit he takes, expreſs the name of the town and county where he takes it; or it ſhall not be held authentic or filed.] [Ord. Ch. 121.]

[No Maſter ſhall take any affidavit except it be fair and legibly writ in one hand, without blotting or interlining of any words of ſubſtance, or if he paſſes the ſame blotted or interlined, the regiſter of the How written.

affidavit, or his deputy, shall refuse the same; and afterwards no use shall be made of it in any proceedings of this court.] [Ord. Ch. 16. 76.]

Masters to administer the oath.

[That affidavits may be reverently and knowingly sworn, the Masters are to administer the oath themselves; and where they see the party rash or ignorant, to give him some conscionable admonition of his duty, and be sure he understands the matter contained in his affidavit; and that he read the same over, or hear it read in his presence, and subscribe his name or mark thereto, before the same be signed or certified by the Master.] [Ord. Ch. 121.]

When filed.

[Affidavits shall be filed in due and convenient time after swearing, and before use be made thereof in court, as well to prevent trouble to the other party by going often to inquire for them, as that he may have time by his counsel to inform the Court of any just exception he may have against the same.] [Ord. Ch. 16. 76.]

[Said, if any affidavit is made to found a motion upon, it must be filed the night at least before the motion, that the other side may have time to take a copy, if the party expects his order should be absolute.] [1 Prax. Alm. 30.]

[All affidavits, (except those belonging to the Supplicavit Office,) before they be read in court, or made use of to found any writs, process, orders, commissions, or proceedings upon, shall be filed and registered in the Affidavit Office, and attested by a copy thereof under the hand of the sworn register of the affidavits, or his deputy *pro tempore*; nor till then shall the six clerks, cursitors, registers, their clerks or deputies, make or pass any writs, orders, *&c.* grounded thereon.] [Ord. Ch. 8. 13. 75.]

Affidavits touching lunatics.

[Yet those touching lunatics and bankrupts are not filed in the Affidavit Office, but with particular officers touching those matters.]

To prove service.

[Every affidavit of the service of process, or of an order, should not only be true, but that it be of use, it is needful it fully prove a good service.]

[If the plaintiff's name, the court, the return of the subpœna, the manner of service, or any thing material be omitted in the affidavit, no attachment must issue upon it for non-appearance; and so of the service of other process and of orders, *&c.* for till a due service, *&c.* be shewn, no contempt appears to the Court.] [1 Prax. Alm. 30.]

[In

[In an affidavit of notice of any thing to a clerk, it is not enough to say notice was given, or the copy delivered to the party's clerk in court; but his name must be expresly mentioned, that it may certainly appear to whom notice was given.] To prove notice.

[It must also be said, notice in writing, or some words tantamount.]

[If he, who gives notice, does not certainly know that he, to whom it is given, is the party's clerk in court, he must say, *as he is informed and believes.*]

[If the notice be left at the clerk's seat, with his agent or clerk; such agent or clerk need not be particularly named.]

[An affidavit of several persons may, by the manner of wording it, be joint or several, or joint and several.] Affidavit joint and several.

The affidavit must be true in substance, with all necessary circumstances of time, place, manner, and the other material incidents; and it must also be sufficient to sustain the case made by the petition or motion of which it is the ground-work. So it should be pertinent and material. How drawn. Hind. 451.

Where a whole petition was recited in an affidavit of service, the costs ordered out of the attorney's pocket. Costs when too prolix. 1 Atk. 139.

In all affidavits, the true place of residence, and addition of every person swearing the same must be inserted. How drawn. Hind. 451.

Small blots or interlineations the Master usually marks in the margin. Hind. 451.

Affidavits are sworn before a Master in Chancery at the public office, between the hours of 10 and 2 and 6 and 8, or at chambers, or at a Master's house. In the country they are sworn before a Master extraordinary; but in the latter case, the place, where the affidavit is sworn, must be 20 miles from *London*, and such Master at the foot of the affidavit must express the name of the town and county where taken, or it will not be filed. The party swearing the affidavit, must subscribe his christian and surname on the left hand thereof, the *jurat* is written on the right. Where sworn. Ord. Ch. 12. Hind. 452.

Pauper affidavits after admittance are not to be engrossed on stamp. In pauper causes.

Where any person shall ground any motion or petition on affidavit of material witnesses to examine in a cause, Of absence of witnesses, how drawn. Hind. 453.

cause, whereby to gain longer time, the affidavit must contain the names of such witnesses, as the party is advised, are very material witnesses to be examined for him in the cause, to the end that the Court may judge of them and prevent all unnecessary delays: Notwithstanding *Ord. Chan.* 26th *Oct.* 1 *James* II. and 1 *Vern.* 334. where it is said not to be sufficient in an affidavit to say such an one is a material witness and beyond sea, without mentioning the point to which he can materially depose.

4 Bro. 88.

When filed.
Hind. 453.

It is sufficient to file an affidavit at any time before, or the day an attachment is made out, but not afterwards; though in 1 *Vern.* 172. it is laid down as regular, if filed before the return of the attachment.

Of a peer.
Prec. in Ch. 92.
1 P. W. 147.

A peeress, ordered to produce deeds, confessed in her answer, on honour only, being in supplement of her answer, and not upon oath. Yet as to all affidavits, or where a peer is examined as a witness, he must be upon oath.

Report.
3 P. W. 142. note.

Where a Master reports any thing admitted by either of the parties, which report is afterwards excepted to, the report must *primâ facie* be taken to be true, and requires at least an affidavit to falsify it.

How drawn.
2 Atk. 60.

Not swearing expressly to words spoken, but adding to that effect, is a proper caution in an affidavit.

Report.
2 Atk. 21.

Upon exceptions to a Master's report, you cannot read affidavits made subsequent to it, notwithstanding the affidavits of the adverse party were filed but the evening before the report.

Taken before solicitor.
3 Atk. 8 3.

Affidavits taken before a person, who was a solicitor in the cause, cannot be read.

Contempt.
3 Atk. 619.

In all cases of commitment for disobedience of an order, there must be an affidavit of service of the order, which has been disobeyed.

Impertinence.
3 Atk. 391.

The affidavit of plaintiff's own solicitor was referred to a Master for impertinence.

Contradictory affidavits, examination.
2 Ves. 26.

On contradictory affidavits of the same person, personal examination is required in court.

When sworn.
2 Eq. Ca. Abr.
14. Barn. 401.

Where the Court orders, that the affidavits on both sides shall be sworn within a limited time, and some of the affidavits on one side are not sworn within the time mentioned in the order, the Court will not enlarge the order, for the neglecting party is precluded according to the established rules of the court. *Hil.* 1740.

Affirmation

Affirmation not sufficient to support a motion for a supplicavit, which, being in the nature of a criminal prosecution, is not grantable, but upon oath of the person applying for it. Affirmation. 2 Atk. 70. Vez. Jun. 49 427.

Ne exeat regno against the husband upon *affidavit* of the wife refused. Ne exeat regno. 1 Vez. J. 49. 3 Bro. 11. S. C

AID PRAYER.

[A PLAINTIFF by his bill pretends title to certain lands, which the defendant by answer claimed to hold by copy of court-roll to him and his heirs, of *J.S.* lord of the manor of *M.* of which these are parcel, and prayed in aid of the said *J. S.*—The plaintiff serving the defendant with process to rejoin, the Court ordered the plaintiff should not proceed till he had called in the said *J. S.* by process.] [Car. Rep. 81.]

[The corporation of *Canterbury* being ordered to answer, they shewed that they held the lands in fee farm of the crown, and prayed the Queen's counsel might be called to defend it. The Court ordered, if her Majesty's counsel should not by such a day shew good cause to the contrary, then the plaintiff might reply and proceed notwithstanding the defendant's prayer.] [Prac. H. C. Ch. 160.]

ANSWER.

VIDE

Infant.
Baron and Feme.
Exceptions.

[AN Answer must confess and avoid, or traverse and deny the material parts of the bill.] For any plaintiff is entitled to a discovery from the defendant of the matters charged in the bill, provided they are necessary to ascertain facts material to the merits of his case, and to enable him to maintain a complete decree; What. [West. 2. part. 194 6.] 2 Vez. 492.

decree; and this is required as well to supply proof, which cannot otherwise be procured, as in aid of proof, which may be procured, for a man may be entitled to an answer respecting that, which he can prove, in order to avoid expence.

Scandal. How drawn. Mos. 45. 70.

[It must contain nothing scandalous or impertinent,] but nothing relevant can be deemed scandalous.

Counsel's hand.

[It must be under counsel's hand, though it is said, that when heretofore it was taken by examination before commissioners upon the tenor of the bill, it needed not be signed by counsel.]

Counsel's hand.

An answer in a town cause must be signed by counsel; where it is taken by commissioners in the country there is no necessity for a counsel to sign it; in early times, when an answer was taken by *dedimus* upon the tenor of the bill, it needed not, the commissioners being barristers at law; and at present in a country cause, where the answer is taken by commission, although the answer is usually drawn or perused and settled by counsel, his signature does not always appear upon the record.

Hind. 199.

Upon oath. [Prac. H. Ch. Chan. 11]

[It must commonly be upon oath or affirmation, except in cases of peers of the realm, who have sometimes answered upon oath and sometimes upon honor.]

[Toth. 12.]

[A bishop has been ordered to answer upon oath.]

[The Lord-Keeper *Egerton* ordered the Lady *Wharton* to answer upon oath, saying, that upon their honor did not bind their consciences any more than if they should be permitted to give evidence to a jury at law upon their honors, where, if the jury found contrary to their evidence, an attaint would not lie against them.]

[Toth. 10, 11.]

Peers answer upon honor. [Ord. Ch. 40.]

[But by an order of the House of Lords, 1640, it is ordered, that the nobility of this kingdom, and Lords of the upper house of Parliament, and the widows and dowagers of the temporal Lords shall answer upon protestation of honor only.]

Prec. Ch 92. 1 P. Wil. 146.

[And so it seems is the present usage.]

Corporation oath.

A bill against a corporation to discover witings, the defendants answer under their common seal, and so being not sworn, will answer nothing in their own prejudice; ordered, that the clerk of the company, and such principal members as the plaintiffs shall think fit, answer on oath, and that the Master settle the oath.

2 Vern. 117.

A. being

A. being at *Tunis*, sues *B.* at law; *B.* brings a bill in equity against *A.*, service on defendant's attorney at law shall be good service; but such attorney shall not be allowed to put in his answer without oath. Answer without oath.

Quære, If defendant were in an enemy's country, where no commission could go to take his answer? 1 P. Will. 523.

A Quaker puts in his answer upon his solemn affirmation and declaration. Quaker.

The Court permitted a Quaker to put in his answer without oath or affirmation, the bill appearing to be frivolous. 1 P. Will. 781.

A Jew is sworn upon the Pentateuch, and generally with his hat on. Jew. Hind. 228.

If the answer be taken without oath or affirmation, which is often the case in an amicable suit, an order must be obtained by motion or petition of course, upon plaintiff's consenting thereto, or, as it most usually is; upon the motion or petition of *plaintiff* himself. Without oath. Hind. 228.

The method of dispensing with the attestation of honor of a peer or peeress of the realm putting in an answer is *mutatis mutandis* the same. Without attestation of honor.

In case of a foreigner not acquainted with *English*, an order of course must be obtained, upon motion or petition for an interpreter; and the answer being engrossed in a foreign language, a translation thereof upon parchment must be made by the interpreter and annexed; the foreigner must be sworn to his answer; the interpreter attending is previously sworn to interpret truly, and conveys to the foreigner the language of the oath, at the same time he swears to the translation as true and just to the best of his ability; and the *jurata* is adapted thereto. Answer in a foreign language. Hind. 228. 3 Bro. 263. 4 Bro. 90.

[Where it was alleged that the defendant was not of perfect memory, the Court ordered, that he should answer without oath, and because there was some doubt whether he was or no, the Court ordered a Master to go to him, to see if he were in a sufficient state to make oath or not, and certify the Court thereof.] Answer without oath, defendant non compos. [Prec. H. Ch. 115.]

[An answer to a matter charged as defendant's own fact must regularly be without saying to his remembrance, or as he believes; if it be said to be done within 7 years before; unless the Court, upon exceptions taken, shall find special cause to dispense with so positive an answer.] How drawn. [1 Px. Alm. 6. Ord. Ch. 99]

Wherever there are particular charges, they muſt be anſwered particularly and preciſely, and not in a general manner, though the general anſwer may amount to a full denial of the charges.

Hind. 197.

Where ſums are ſpecifically charged in the bill to have been received by the defendant, he muſt anſwer ſpecifically to them, and it is not enough to refer to a ſchedule of all ſums received.

1 Bro. 503.

[As to the act of another, which defendant does not certainly know, he ought to ſay, he thinks or believes it to be true, or does not, and not ſay only that he has heard.]

A defendant having ſworn, that he received no more than ſuch a ſum, to his remembrance, allowed upon exceptions.

2 Vern. 470.

Forfeiture. [Prac. H. Ch. 10]

[A defendant is not obliged to anſwer ſo as to ſubject himſelf to any forfeiture at law thereby]

2 Vez. 245. 492. [1 Ch. Ca. 277.]

[But bills for diſcovery (for evidence) in pure matters of *meum* and *tuum* are good, and muſt be anſwered.]

Counſellor.

[A counſellor, clerk, or ſolicitor, is not obliged to anſwer what he knows of his client's cauſe, as ſuch. *Vide Counſellor.*]

Ibid.

Referee. Ibid.

[Neither is a referee; where it is agreed that what paſſes at the reference ſhall not be diſcloſed or made uſe of on either ſide.]

How drawn.

[If defendant deny a fact, he muſt traverſe it directly, and not anſwer by way of negative pregnant; as if he be charged with receiving a ſum of money, he muſt traverſe, that he hath not received that ſum or any part thereof; or ſet forth what part he hath received and deny the reſt.]

[Ord. Ch. 99.]

[Or, if a fact be laid to be done with divers circumſtances, the defendant muſt not deny it or traverſe it literally, as it is laid in the bill: but muſt anſwer and traverſe the point of ſubſtance.]

[Ord Ch. 99. Toth. 55.]

Baron and Feme.

[If appearance be entered for huſband and wife, and he anſwers, but ſhe does not; an attachment commonly iſſues againſt both. *Vide Baron and Feme.*]

Appearance. [1 Prax. Alm. 6. Toth. 65.]

[If defendant's appearance be time enough within the term, rule muſt be given to anſwer within 8 days, which if he fails to do or excuſe, an attachment may be made out againſt him.]

When anſwer to be put in. [3 Prax. Alm. 53.]

[The rule may be given the day after Coſts-day, (*vide* title *Appearance*,) and muſt be entered with the regiſter.]

register.] *Note*; the next day after the return of the subpœna is Costs-day. [Cur. Can. 98.

[If a defendant appears and no rule be given, he is at liberty to answer any time during the term: if defendant does not answer in time, attachment issues of course; but the same with the cause thereof must be entered with the register; as that he appeared and departed without answer; and that he answered not by the day prefixed; or that he did not return the *dedimus* by the day; or otherwise as the case shall require.] [Toth. 8. 10.]

[Where a subpœna is returnable so near the end of term, that there cannot be a day given the defendant to answer; in such case the defendant must at his peril answer the same day seven-night following his appearance, though out of term: for the Court of Chancery is always open. *Vide* title *Appearance*.] [Ibid. 7.]

[The Court on motion will ordinarily grant 10 or 14 days, or more, perhaps to the ensuing term, to answer upon cause shewn; as that the defendant cannot answer without sight of writings, which are in the country, or without conference had with some person named in the bill, or some other whom the matter toucheth, or without sight or perusal of goods, *&c.* above 20 miles from *London*.] Time to answer. [Ibid. 7.]

[The bill came in the last day of term, and the defendant, not in contempt had time given to the next term to answer.]

[*Note*; All what is said above of the time of answering, is to be understood, where the defendant is within 20 miles of *London*; for if the defendant be above 20 miles from *London*, he has a *dedimus* of course to take his answer in the country, which ought in strictness to be returned and put in the day after the first Costs-day of the next term following, except *Trinity* term, and then it need not be put in before the second day after the second return, and it is usual to stay for it till the latter end of any term, because of the convenience of returning it by the country solicitors, who generally come up late.] [Prax. Alm. 8. 9.]

A defendant in all cases, by the course of the Court, has 8 days exclusive of the day of appearance to answer the plaintiff's bill; if he cannot in that time complete his answer, the Court upon application will of course grant him three orders for time (except to

answer

anſwer an amended bill). The time limited by theſe three orders depends upon the reſidence of the defendant: if he reſides within 10 miles (which is a town cauſe) or within 20 miles of *London*, the Court makes an order upon the firſt application for one month; upon the ſecond application for 3 weeks; and upon the third application for a fortnight.

Hind. 225.

If the defendant uſually reſides above 20 miles from *London*, (which is a country cauſe, he is entitled to 3 orders for time to put in his anſwer, except it be to an amended bill, 6 weeks upon the firſt application, 3 weeks upon the ſecond, and a fortnight upon the third, and this, in all caſes, whether he comes to town and ſwears his anſwer at the public office, which he may do if he pleaſes, or whether he obtains a commiſſion to take his anſwer in the country.

By the late practice the third order uſed to be procured upon defendant's undertaking by his counſel or clerk in court not to pray any further time: yet when a defendant had not been able to perfect his anſwer within the time preſcribed by the ſeveral orders above-mentioned, upon application, ſtating by affidavit, the particular circumſtances of his caſe, he was uſually indulged with ſtill further time, but upon condition, that he entered his appearance with the regiſter as upon an attachment returned and conſented, that a ſerjeant at arms ſhould go againſt him.

Hind. 226.

But the preſent practice ſeems to have entirely put a ſtop to any further application after the third order; for it is now ordered that defendant, upon obtaining a third order for time to anſwer, ſhall enter an appearance with the regiſter, and conſent that a ſerjeant at arms ſhall go againſt him as upon a commiſſion of rebellion returned *non eſt inventus*, in caſe of a non-compliance with the order: and on the ſecond application for time to anſwer an amended bill, or after exceptions allowed, defendant muſt conſent to the ſame terms.

Ord. 23. Jan. 1794. 4 Bro. 534.

Attachment. Hind. 225.

The firſt order ought regularly to be obtained and ſerved before the 8 days for anſwering are elapſed; for after that time the defendant, in ſtrictneſs, may be attached for want of an anſwer, if an order for time be not ſerved: and alſo each ſucceſſive order

for

for further time ought to be ſerved before the precedent order expires; but this rarely or never is attended to, the plaintiff's clerk in court uſually giving the defendant an opportunity of getting an order for time: for although the time for anſwering be expired, without any demurrer, plea, or anſwer being filed; by the curteſy of the office, the defendant's clerk in court expects to be called upon by the plaintiff's clerk in court for an anſwer, and alſo to have a notice of attachment before any attachment is actually ſealed, that he may give his client ſufficient notice to procure an order for time.

Country cauſe. Time to anſwer.

A defendant in a country cauſe is ſeldom called upon to anſwer until the enſuing term, and then he generally applies for his firſt order for time by moving or petitioning for a *dedimus* to take his plea, anſwer, or demurrer, not demurring alone, which is called a ſpecial *dedimus*, and ſix weeks time to return the ſame.

1 Har. 280.

Commiſſion. Hind. 229.

An ordinary *dedimus*, by which an anſwer or plea can be taken, is made out by the clerk in court without any order, and is made returnable without delay, or on a day certain in term according to the preſent practice.

In ſhort terms, and where the defendant lives a great diſtance from town, he muſt have a commiſſion with a longer return than when the defendant lives nearer town: and theſe proceedings are generally adapted to the convenience of both parties, and what time the defendant ſhall have, is uſually ſettled among the clerks themſelves.

Hind. 229.

Moſ. 176. Har. 281.

By the rules of the court a *dedimus* is returnable the firſt return of the next term, but by the practice is not returned till the ſecond return of *Hilary* and *Trinity* terms, becauſe the vacation between *Michaelmas* and *Hilary* and between *Eaſter* and *Trinity* are ſo ſhort; and this practice was allowed by the Maſter of the Rolls.

Hind. 226.

The ſeveral orders for time may be obtained by motion in court, or by petition to the Maſter of the Rolls, ſtating the time already obtained, and praying the further time required.

How time to anſwer obtained. 1 Har. 281. By motion.

The method of obtaining an order for time, on motion or petition, is by giving inſtructions to counſel to move of courſe any day in term at the riſing of the

Court, or at the Rolls, as well in term as on the first morning after term, or on a seal day before or after term for the time to which the party is entitled.

By petition.

The mode by petition is by engrossing and leaving a petition, addressed to the Master of the Rolls, at the Secretary's office in the Rolls'-yard, and paying 5*s.* 6*d.* when it is taken away; the petition as answered is to be left at the Register's office to draw up the order, which is to be passed, entered, and served.

Hind. 227.

Answer.

The answer being drawn or perused and settled by counsel, must be engrossed on parchment, on each skin of which there must be an half-crown stamp; the jurata must be written on the top of the answer on the left hand, in the following form:

Ibid.

" Sworn at the Public-office in ———
" day of ——— before ———"

In a joint and several answer write *both sworn.*

How sworn and filed.

The answer being thus complete for swearing the defendant, *intending to swear his answer in town,* must be produced at the Public-office, where the Master attending the office will swear him to his answer, having first interrogated him, as to his knowledge of the contents of it; at the same time the defendant must sign his christian and surname at the foot of his answer, on the right hand, in the presence of the Master. For the oath one shilling is paid to the clerk, and the answer when sworn is to be left at the Public-office, until the clerk in court comes to fetch it away to be filed, upon notice given him by the solicitor.

Ord. Ld. Hardw. 1748.

2 Atk. 290.

Where defendant is ill. Hind. 227.

If a defendant be within 20 miles of *London* and sick, the Master ought in strictness to go to him to take his answer, for which an extraordinary fee of two guineas is paid.

An answer may be sworn at a Master's house.

Appearance.

[If the defendant stands out process of contempt upon an appearance, and doth not answer, he will be committed.]

Process of contempt.

[*Affidavit* was made, that the defendant was sick and weak and so disordered in mind, that he was not able to answer: the Court, on motion, ordered all process of contempt to stay for a reasonable time, till a Master should go and see whether he were capable or no.]

[Ordinarily

[Ordinarily an anſwer ought not to ſet forth deeds *in hæc verba*; and although the bill pray the defendant may ſet them forth, yet if the defendant ſays he is ready to let the plaintiff have copies of them, or, if he does not ſay ſo, and ſet forth but part of them, it ſeems well, and the Court will order, that the plaintiff have liberty, at his own charge, to take copies of them, without ſending them to a Maſter; or will order, that the defendant produce them on examination of witneſſes, *&c.* as there is occaſion. *Vide* Deeds.] Anſwer, how drawn.

[An anſwer is not reputed as ſuch till filed.] Not an anſwer till filed.

[Yet where it is in the office and ſhewed the plaintiff's clerk, if it contains any thing, which gives an anſwer to ſome ſuggeſtion of the plaintiff's, whereby he is praying favor of the Court, he ought to take notice of it; as where he prays a *ne exeat regnum* upon belief and information, that the defendant is going beyond ſea; if the defendant's anſwer be in, as aforeſaid, and denies, that he is about or deſigns to go, the plaintiff ought not to have the writ, becauſe he has ſufficient means to be ſatisfied he needs it not.]

[An anſwer is not to be filed till the coſts of contempt for not anſwering be paid.] Coſts of contempt.

[And ſaid, ſo it is, though the plaintiff joins in commiſſion for anſwering.]

[The defendant may without notice move to amend his anſwer in a ſmall matter; but, if it be in a material point, he muſt give notice of the amendment prayed to the plaintiff's clerk or ſolicitor, if it be in a material point that he prays to amend, the Court often grants it, if the defendant was ſurpriſed therein.] Amending anſwers. [1 Ch. Ca. 29.]

[Said, an anſwer may not be amended after iſſue joined; yet it hath been ſometimes done.] [Toth. 13. 3 Px. Alm. 37.]

[A defendant having in two anſwers ſworn, that ſhe had no further demand than ſo, does without notice ſwear a third anſwer, and ſets up another bond; the Court ordered the bond to be brought before another Maſter, and that he ſhould examine if ſhe was duly ſworn to the anſwer.] *As to amending anſwers, vide page* 29.

[Where a priſoner has appeared to a bill, he ſhall not be brought up to anſwer till the time for anſwering is out.] Priſoner.

[But where the defendant, who has appeared, is in priſon, and will not anſwer, an attachment being entered [Cl. Tut. 21.]

entered against him, an *habeas corpus* may be moved to bring him to the bar, to shew cause why he does not answer.]

Bill taken pro confesso.

[Where a defendant has appeared to the bill, and then stands out all process of contempt, the Court will take the matter *pro confesso*, and decree it.]

[Px. Alm 8.]

[And so it is, where he is in custody upon any such process of contempt; and being brought into court, and having the bill read to him, he is required to answer, but obstinately refuses so to do.]

[Cl. Tut. 23.]

[So, if he be in prison at the suit of any other, and stands out all process of contempt, he shall be sent for by an *habeas corpus* and brought into court, where if he refuse to answer, a day shall be given him; and if he doth not then answer the bill shall be taken *pro confesso*.]

[Cl. Tut. 192] [Ch. Rep. 284.]

[But the defendant must have appeared or been some way in court, else no decree can be had against him.]

[Cl. Tut. 19.]

[*Note*; When he cometh in upon the *habeas corpus*, if he be in execution, he shall be remanded to the prison from whence he came: if not upon execution, then he shall be sent to the Fleet.]

Hearing. [Px. Alm. 7.]

[If there be many defendants, and the one has answered, the rest not, in some cases the plaintiff may proceed to hearing against that one alone, and afterwards against the rest.]

Scandal.

[After an answer is reported scandalous or impertinent, the Court must be moved, that such part of it may be expunged, and that defendant pay costs.]

[A copy of an answer sworn but not filed, given to the plaintiff to enable him to defend his injunction, on notice, that the defendant would move to dissolve it on matter contained in the answer, was held sufficient. Not so where a copy of the answer was given him before the answer was sworn.]

[Baron and Feme.]

[If husband and wife have appeared, and he only answers, an attachment may be sued against both, when the time of answering is out, unless there be an order for him and his wife to answer separately.]

[Toth. 11. 2 Eq. Ca. Ab. 66.]

[Though the wife is not ordinarily to answer without her husband, yet in special cases, the Court will upon motion order, that she answer alone; without which order a sole answer by her will be suppressed.]

[Where the husband was out of the kingdom, and could not be brought to answer a breach of trust, in which

which the wife was mostly concerned, the Court ordered her to answer alone.]

Bill against husband and wife, for a demand out of the separate estate of the wife, and the husband beyond sea, and not amenable by the process of the Court; yet if the wife be served with process, she must appear and answer. 2 Vern. 613.

Regularly the answer of a feme covert, if separate, ought to have an order to warrant it; but if the feme's separate answer be put in without an order, and the same be a fair and honest answer, and deliberately put in with the consent of her husband, and the plaintiffs accept it, and reply, the Court will not, at the motion of the wife, or of her executors, set it aside. 2 P. Will. 371.

A feme covert appearing and obtaining an order to answer separate from her husband, who is abroad, the Court will not afterwards set it aside. 1 Vez. 384.

Where the wife lives separate from her husband, she is after ordered to answer alone. 1 Ch. Rep. 68.

If a feme covert cannot in conscience consent to such an answer as is drawn up by the husband, she is not obliged to submit to it; upon application to the Court she may be considered as a separate person and will be allowed to answer distinct and separate from her husband. Where a husband prevails upon a wife to put in an answer contrary to what she believes is the fact, he may be punished for a contempt. 2 Atk. 50.

If the wife's answer differs from the husband's, it shall not prejudice the husband, as if she confesses a trust, which he denies: for she can be no witness against her husband. 2 Ch. Ca. 39. 2 Vern. 79.

A husband by bringing a bill against a wife admits her to be a *feme sole*, and she must put in her answer as such, and there is no instance of appointing a guardian to put in her answer in such case. 3 Atk. 498.

[The defendant must answer ere he can move that the plaintiff may make his election, whether he will proceed here or at law.] Election. 3 P. Will. 90.

[Said in an answer to a bill to redeem, the mortgagee ought to say he is willing to receive his money as the Court shall direct; for then the Court will not order him to receive it without a reasonable notice; but if he says generally, he is ready to receive the Mortgage.

money, the Court will order it to be paid immediately.]

Bond. [Said, if the defendant, by anſwer to a bill to be relieved againſt the penalty of a bond, ſays, he does not inſiſt upon the penalty, but is ready to receive his principal, intereſt, and coſts, the parties ſhall be forthwith ſent to a Maſter to examine what is due, &c.]

Action at law. [If, in an anſwer to a bill to be relieved againſt an action upon the caſe at law, the defendant ſwears money due, the Court will ſometimes order a judgment to be given in debt with a releaſe of errors, or the injunction to be diſſolved.]

Purchaſer. Notice. [In an anſwer a purchaſer for a valuable conſideration need ſet forth no deeds or writings, but thoſe, by and under which, he more immediately claims.]

[Nor need a purchaſer without notice, or any in the like caſe, as is ſaid, in his anſwer or plea, ſet out the conveyances at large, nor the ſums or dates, but only in general ſay by good and ſufficient conveyances in the law, or ſuch, in particular, for a real and valuable conſideration in money paid.] *This, however, ſeems only to relate to caſes, where the bill does not interrogate as to thoſe facts. For where the bill interrogates as to the dates of the conveyances, and the particulars of the conſideration paid, the defendant muſt anſwer, though he deny notice.*

Eq. Ca. Ab. 36. pl. 3. A purchaſer may charge and diſcharge himſelf by his anſwer, and ſaid, that he is not bound by any improvident offer in his anſwer. *Sed quære.*

Moſ. 73. And notice may be denied by plea or anſwer where a defendant pleads himſelf a purchaſer for a valuable conſideration.

Anſwer inſufficient. [When the firſt anſwer is reported inſufficient, the defendant, if he anſwer again without excepting to the report, muſt anſwer all the points as before excepted to by the plaintiffs, though the ſame exceed the bill.]

The defendant by ſubmitting to anſwer *without excepting* to the firſt report of inſufficiency, has not precluded himſelf from inſiſting on the ſame matter by his ſecond anſwer, but upon exceptions allowed to that ſecond anſwer, may except to that ſecond report, and ſo bring it before the Court; and where there have

2 Ves. 492. been ſeveral exceptions, the Court has always ſaid, that as this matter has not undergone the judgment of

of the Court the defendant ſhall be ſuffered to go into it; but if it was a ſingle exception perhaps it would be another matter.

[Where there are croſs bills, the defendant in the firſt bill muſt anſwer before he in the laſt ſhall be compelled to put in his anſwer. Nor by the courſe of the Court can the plaintiff in the laſt bill have proceſs of contempt againſt the other, till 8 days after his own anſwer is in.] Croſs bills.

A. brings his bill againſt *B.* and *C.* who put in insufficient anſwers, and prefer their croſs bill againſt *A.*; *B.* becomes a bankrupt; his aſſignees bring their bill in nature of a bill of revivor againſt *A.*, they ſhall not go on till *C.* has anſwered *A.*'s bill. And in caſe the plaintiffs in the laſt bill ſhall attempt to take out proceſs of contempt, the defendant may obtain an order, that he may have a week or a fortnight's time to put in his anſwer to the croſs bill, after the defendant to the original bill has anſwered. *Vide Publication* 1 P. Will. 367. 3 Atk. 724. 1 Atk. 291.

If after a croſs bill filed a plaintiff in an original bill will amend it in *material points*, and thinks fit to compel an anſwer to the amendments at the ſame time with the original bill, he waves his priority of anſwer to the original bill. So, if defendant in the croſs cauſe, who is plaintiff in the original, puts in an insufficient anſwer, he loſes his priority. Croſs bill. Amendments. 2 Atk. 218. 2 P. Will. 435. 3 Atk. 725.

[Said, Where a plaintiff cannot be found or heard of, the Court upon affidavit and motion will order the anſwer to ſtay till the plaintiff's clerk in court, by note in writing ſhews where he lives.] Plaintiff not to be found.

[Though the defendant's anſwer concludes himſelf, but doth not ordinarily affect another defendant; yet where one defendant anſwered and the other refuſed, the Court ſaid he ſhould be bound by the other's anſwer, if upon it, the cauſe were againſt them.]— *This caſe ſeems to be unſupported by any ſubſequent determination.* Anſwer of one defendant. Toth. 12. 3 Atk. 232.

Regularly the anſwer of one defendant ſhall not be read as evidence againſt another defendant: but one defendant ſaying, he was in years and could not remember the matter charged by the bill, but that *J. S.* was his attorney and tranſacted the matter; and *J. S.* being made a defendant, and giving an account of the matter, the anſwer of the attorney was allowed to be read againſt the firſt defendant. 1 P. Will. 301. 2 Ves. jun. 12.

Answer in another cause. 1 Ves. 389. 2 Ves. 42.

Defendant's answer in another cause read to prove that a deed once existed.

Answer directed to be read to a jury.

Plea. Demurrer. 3 P. Will. 95. 1 Atk. 450.

Whatever part of a bill is not covered by a demurrer or plea, must be defended by answer, unless the defendant disclaims: if the plea be over-ruled, the defendant may insist upon the same matter by answer.

Scandal. Penalty. 1 Vern. 109. 2 Vern. 244. 3 P. Will. 374. 1 Atk. 539. 2 Atk. 393. 2 Ves. 245. 389. 491. 1 Ves. 247.

But, if the discovery sought by the bill is matter of scandal, or will subject the defendant to any pain, penalty, or forfeiture, or to any ecclesiastical penalties or punishment, he is not bound to make it: but he must answer, whether he has a legitimate son, but not whether he is married or not, or whether he is an alien or not; and if he pleases he may insist by answer, that he is not bound to make the discovery.

Stat. limitations. 2 P. W. 145.

Where a defendant insists on the statute of limitations by his answer, he shall at the hearing have the same benefit as if he had pleaded it.

Witness. 2 Bro. 252. 3 Bro. 238. 1 Ves. jun. 292.

Where a mere witness has been made a defendant, and has submitted to answer, he shall answer fully, for he ought to have demurred.

Plea. Demurrer. 4 Bro. 12.

And it has been laid down as a general rule by the Lords Commissioners, that where a bill seeks a discovery of matters, which the defendant is not obliged to answer, he must plead or demur, for if he answers, he must answer fully.

2 Bro. 332.

But where a defendant has answered all the circumstances relating to his own case, he shall not be compelled to answer the further circumstances of the bill; yet, if he answers part of the circumstances, as state part of a conversation, he shall be compelled to state the whole of it.

J. S. gave a bond to pay 800*l.* a-year to *H.* during the time *S.* enjoyed the office of ———, or whilst any body held it in trust for him; *H.* put the bond in suit, *S.* brings a bill for an injunction, and a cross bill is brought by *H.* to discover whether *E.* held the office in trust for *S.* *S.* insisted by answer, that he was not obliged to discover what would subject him to the incapacities of the several acts, to vacate a seat in parliament, on a member's accepting a place. Defendant is not bound to make the discovery, though he submitted to answer, he could not have demurred, for that would have admitted the facts to be true.

3 Atk. 276.

Although

Although the defendant by his answer denies the title of the plaintiff, yet in *many cases*, he must make the discovery prayed by the bill; and notwithstanding the plaintiff, if he has no title, can have no benefit of the discovery. If a bill be filed against an executor by a creditor of the testator, the executor must set forth an account of the assets, though he denies the debt.

Discovery. Hard. 188. 3 Bro. 483. Sed vide. Gilb. 229. Amb. 343. Mitf. 248.

If a man by answer swear that what he received, he received as a menial servant, and hath paid it over to his master, he shall not be put to account again: but he ought to disclose this matter in his answer, and a plea of this sort has been over-ruled.

Account. 1 Vern. 95. 136. 208.

A defendant has been held to the offer made in his answer, though the circumstances of the case are varied since the answer came in.

Offer. 1 Vern. 448.

If fraud be charged in a bill it must be denied by answer, and not by way of plea.

Fraud. 1 Vern. 185.

Where there is a joint and several answer by *A.* and *B.*, if *A.* for himself answers, and *B.* says that he hath perused the answer of *A.* and believes it to be true, supposing *B.* charged with nothing of his own knowledge, such relative answer is sufficient: but it is otherwise where the defendants answer severally.

Joint and several answer. Hard. 165.

Where there is a decree against an infant, on such infant's coming of age, and before the decree made absolute, he may put in a new answer.

Infant. 1 P. Will. 504. 2 P. W. 401. 2 Atk. 531. Bunb. 338.

Exceptions will not lie to an infant's answer.

4 Bro. 256.

Defendant in custody for want of an answer puts it in, and is entitled to be discharged, paying his costs: for he is not to remain in custody to see, whether his answer is reported sufficient or not, and in case it should turn out insufficient, process must be continued from where it was left off before.

Prisoner. 2 Ves. 111. 4 Bro. 212.

Defendant in custody for non-payment of costs, after answer put in, cannot be detained till further answer, though exceptions have been allowed, but is discharged upon payment of the costs.

4 Bro. 223.

Defendant in custody for want of an answer, on putting in the answer and depositing the utmost sum to which the costs could amount, subject to taxation, may be discharged.

4 Bro. 296.

All answers and pleas, as well those taken by commissioners in the country, as before the Master, shall be signed by the persons swearing such answers or pleas in

Signed by defendant. 2 Atk. 290. Ord. April 7, 1748.

in the presence of the commissioners, or masters, before whom the same shall be taken respectively.

Charge by answer. 2 Atk. 383.

Where plaintiff is charged by answer, he must discharge himself by proof, for he cannot read the whole answer as he may at law.

Answer to amended bill. 3 Atk. 303.

The original bill brought for discovery only, the amended bill prays relief. The answer to the amended bill is to be considered as part of the answer to the original bill, as much as if engrossed upon the same parchment and a part of the same record.

Plea. 3 P. Will. 79. 1 Bro. 56.

Defendant obtained three orders for time to answer, upon the expiration of the last, he put in a plea, which was held a sufficient compliance with the order. *Gilb.* c. 92. 1 *Har.* 359.

Demurrer. 2 Bro. 78.

Motion to discharge a demurrer (after motion for time to plead answer or demur, not demurring alone) granted, the answer only denying combination and therefore not complying with the order.

Bill taken pro confesso. 2 Bro. 280.

Whenever an order is made to take a bill *pro confesso*, if defendant comes in upon any reasonable ground of indulgence and pays costs, the Court will attend to his application, if the delay has not been extravagantly long: but the mere gratuitously putting in an answer is not sufficient to over-rule the order.

General traverse. 2 P. Will. 87.

Where the general traverse is omitted at the end of an answer, such answer is good, and not to be suppressed as improper.

Second answer. 2 Ves. jun. 87.

A second answer may be filed, pending exceptions to the first; it may be filed at any time before the order is obtained for amending the bill, even the moment exceptions are filed.

Mistake in the answer. 2 Ves. jun. 372.

Defendant not bound by a mistake in his answer, as to the effect of an instrument, where the answer referred to the instrument.

Disclaimer. 1 Anst. 37.

An agent charged by the bill with personal fraud, cannot by disclaiming interest, avoid answering fully.

Discovery. Letters, &c. referred to. Ibid. 58.

Where a discovery is sought of a correspondence, if the defendants set forth *extracts of letters*, and swear that those are the only parts of the correspondence upon that subject, this is sufficient.

Letters, &c. referred to. Ibid. 59.

So when a party refers to extracts from books of accounts, those parts, which he states to be immaterial, are left sealed up.

A trustee

A truſtee in a will, who releaſed and never acted, ought not to be made a party in a ſuit, to ſet aſide the will on the ground of fraud, and therefore need not anſwer as to the fraud alledged, he not being charged with perſonal fraud. Truſtee. Ibid. 65.

On a bill for diſcovery, the anſwer of the party interested can not be diſpenſed with, though an infant; and although the perſon from whom his father purchaſed the right has anſwered, and denied any knowledge of the circumſtances. Diſcovery. Infant. Ibid. 77.

The wife lived in adultery with the plaintiff. The huſband allowed to anſwer ſeparate. Baron and Feme. Ibid. 269.

It is not neceſſary in an anſwer, that a *modus* ſhould be laid with the ſame certainty, as in a bill to eſtabliſh a *modus*, if it appears that there is a good defence, it is enough. How drawn. 2 Anſt. 402.

Where a defendant files an anſwer, as a Quaker, without oath, he undertakes that he is a Quaker; if he were indicted for perjury upon it, he would not be permitted to contradict this aſſertion. Quaker. Ibid. 479.

The anſwer ſet up a *modus* for a place not deſcribed by metes and bounds, but by a map annexed to the anſwer, this was held ſufficiently certain. How drawn. Certainty. Ibid. 498.

A motion for leave to anſwer by guardian, muſt name the guardian. Guardian. Ibid. 365.

Further Anſwers, and Anſwers to amended Bills.

A FURTHER anſwer is in every reſpect ſimilar to, and conſidered as forming part of the firſt anſwer: for, if a defendant in his firſt anſwer refuſes or neglects to anſwer all the material and relevant points in the bill, or anſwer them inſufficiently and imperfectly; the points of the bill not anſwered, or anſwered inſufficiently, are ſelected from the record; and being collected together form exceptions, an anſwer to which is termed a further anſwer. Further anſwer. What. Hind. 279.

Matter diſcloſed by the defendant's anſwer, or facts exiſting at the time of exhibiting the bill, and not then known to the complainant, or conſidered neceſſary to conſtitute Hind. 280.

conſtitute part of his caſe, are by the complainant, with leave of the Court, added to or inſerted in the bill by way of amendment, and the anſwer, which the defendant is compellable to make thereto, is denominated *an anſwer to an amended bill.*

Anſwer to amended bill. 3 Atk. 303. What.

As a further anſwer is conſidered as forming part of the firſt anſwer, ſo an anſwer to an amended bill is conſidered as part of the anſwer to the original bill, as much as if it had been engroſſed on the ſame parchment, and a part of the ſame record; therefore, if a defendant in a further anſwer, or an anſwer to an amended bill, repeat any thing contained in a former anſwer, the repetition, unleſs it varies the defence in point of ſubſtance, will be conſidered as impertinent.

Hind. 280.

Exceptions.

A defendant has eight days after plaintiff has filed exceptions, to make his election, whether he will ſubmit to anſwer them or not. A defendant is uſually called upon by the plaintiff's clerk in court, to anſwer, after the eight days are expired; and if he ſubmit to put in a further anſwer, the plaintiff's clerk in court generally calls for the anſwer, and gives notice of attachment, if it be not forthcoming, *&c.* before the further anſwer is filed, defendant muſt pay to plaintiff twenty ſhillings coſts.

Hind. 261.

Exceptions.

Where a firſt anſwer, upon exceptions longer than the bill, is reported inſufficient, the defendant, if he ſubmit to put in a further anſwer, without excepting to the report, is to anſwer all the points excepted to, although the ſame ſhould exceed the charges in the bill, for by not excepting to the report, he has admitted, he ought to anſwer all the matters of exception. *Contrà*, 2 *Vez.* 492.

1 Ch. Ca. 60.

Contempt. Inſufficient anſwer.

Where a defendant in contempt for want of an anſwer, puts in an inſufficient anſwer, and the coſts of contempt are accepted, the acceptance of coſts remits the contempt, and in proceſs for a ſecond anſwer, the plaintiff muſt begin *de novo*; if the coſts be not accepted, although tendered, and the firſt anſwer be reported inſufficient, the plaintiff may take up the proceſs for the ſecond anſwer, were he left off upon obtaining the firſt; therefore, it is uſual to refuſe accepting the coſts of contempt for the firſt anſwer, until it appears, that it is a full anſwer.

2 P. Will. 481.

Plaintiff

Plaintiff accepting a third answer, before he receives costs for the second, does not waive his title to the costs. 3d Answer. Bunb. 34.

If the plaintiff procure a reference of an insufficient answer, and the same be reported good, the plaintiff shall pay the defendant 40 *s.* costs, and the defendant may proceed for recovery of these costs by subpœna and attachment, in like manner as the plaintiff, if the report be in his favour. Reference. Ord. Ch. 101. Costs. Gilb. Ch. 103.

If the second answer be reported insufficient in any of the points formerly certified, the defendant shall pay 3 *l.* costs, and such answer may be referred immediately. And upon a third insufficient answer 4 *l.*; and upon a fourth insufficient answer 5 *l.* and be examined upon interrogatories to the points reported insufficient, and shall be committed until he has perfectly answered these interrogatories and paid the costs. 2d Answer insufficient. Costs. Ord. Canc. 102.

A defendant's plea was over-ruled, and then he put in three insufficient answers; the Court did not think fit to commit him to be examined upon interrogatories, as if he had put in four insufficient answers. Plea. 1 Ch. Ca. 279. Mos. 384. Three insufficient answers.

Plaintiff is not bound to serve *defendant* with a new *subpœna* to put in a further answer. Service on his clerk in court is always allowed to be good. Subpœna for better answer. 1 Vez. jun 250. 1 Harr. 314.

For the costs of insufficient answer, plaintiff takes out a subpœna and serves the defendant *personally* therewith, and demands the costs; and on default of payment, and affidavit of service of subpœna, demand of costs, and refusal, an attachment issues, and all the other process to sequestration. Costs of insufficient answer. 1 Har. 314.

Amending Answers.

THERE are no certain rules for amending answers, but in this the Court exercises a discretion; and will in some cases permit a defendant to rectify an error or supply a defect in his answer, either by amendment or by a further answer. 1 Har. 307. Mitf. Treat. 19.

An answer cannot be amended after issue joined. *Sed vide* 3 *Px. Alm.* 37. Toth. 75.

The

The defendant may without notice move to amend his answer in a small matter: but if it be in a material point, he must give notice of the motion for such amendment to the plaintiff's clerk in court, or solicitor; and though it be in a material point, or after issue joined, yet the Court will, on affidavit of surprise, and payment of costs, allow of an amendment.

1 Eq. Ca. Ab. 29.

Liberty given the defendant to amend her answer, her affidavit stating that she was surprised therein; this was before replication, and was not opposed by the plaintiff.

1 Ch. Ca. 29.

The defendant having consented by answer, that an award made by her father might be confirmed, prayed, she might amend her answer, she having made oath, that she never read the award, and that her answer was prepared by her father, who had wronged her in the award. But the Court refused to let the answer be amended.

2 Vern. 434.

Defendant moved to amend his answer, by striking out particular words and inserting others in their room; defendant made affidavit of the mistakes, which was corroborated by the affidavit of another person. Lord Chancellor—"If there had only been "defendant's affidavit, I would not allow the amend-"ments, but as there is the affidavit of another person, "I will:" and he ordered accordingly.

2 Eq. Ca. Ab. 60. Woodgate v. Fuller.

Bill by next of kin of testator against executor, to account for the surplus; the executor answered, and waived the benefit of the surplus by mistake of the law in that point, and though he afterwards proved, that the testator intended him to have the surplus, yet not suffered to amend his answer.

1 P. Will. 297.

No certain rules as to the amendment of answers; they are in the discretion of the Court: amendments have not been merely confined to mistakes in the answer, where it has differed from the draft; but answers have been allowed to be amended, where there have been mistakes of matters of fact. His Lordship said, he had known answers amended after prosecution for perjury commenced, but only where circumstances were extremely strong to shew it a mistake. In the principal case the nature of the fact speaks it, that as the answer now stands the clause could not have been inserted to serve any interest of the defendant. It was not a fact asserted by the answer, but admitted by it.

Barnard. Eq. Rep. 50.

Motion

Motion for leave to amend an anſwer in three particulars, wherein the defendant found herſelf miſtaken; and *per Cur.* we often do it, where iſſue is not joined; and it was ordered accordingly. Bunb. 186

Leave was given to amend an anſwer to a tythe bill, wherein the defendant had ſworn, that a particular cloſe contained nine acres, and to make it ſeventeen, though iſſue was joined and a commiſſion had iſſued, (which was never done before,) but it was upon the defendant's paying all coſts ſince the anſwer, ſwearing the anſwer over again, and taking out a new commiſſion at his own expence. But ſince, in the caſe of Mr. *Wortley Montague* v. ———, the Court refuſed to let the defendant amend his anſwer by only altering the day of payment of a *modus*, although iſſue was not joined, and the day ſet right in a croſs bill. In a note. Bunb. 248.

Attorney-General had put in the common anſwer, (*viz.*) that he was a ſtranger to the matters of the bill, and that he hoped the intereſts of the crown would be taken care of, *&c.* The Attorney-General afterwards prayed, that he might be at liberty to withdraw his general anſwer, and inſiſt on the particular right of the crown to the money in queſtion; and it was granted. Bunb. 303.

Bill to aſcertain boundaries of lands intermixed. Defendant, by the draft of his anſwer, ſwore that 25 or 30 acres had 35 years ago been allotted to the plain iff; but in the engroſſment this was by miſtake made 250 or 300; on an affidavit of the miſtake, and how it came, the Court gave leave to amend; they would not, however, let him amend another miſtake of 86 acres, inſtead of 68; the draft and the engroſſment being the ſame. Bunb. 295.

Bill for a diſcovery of title, and for an account of rents and profits. Defendant in her anſwer ſaid, ſhe had purchaſed the eſtate in 1676, and had continued in poſſeſſion ever ſince, and had received the rents and profits thereof; on recolleſtion the defendant diſcovered, that by agreement on the purchaſe, the vendor and his wife were to continue in poſſeſſion and receive the rents and profits during their lives, which they did until the year 1690. Upon motion the Court gave leave for the defendant to amend her anſwer in this particular, it being rather Bunb. 323.

for

for plaintiff's benefit, and the defendant being 95 years of age.

The Duchess of *Wharton* petitioned, that she might be at liberty to amend her answer by adding a new fact. In her answer, she referred to marriage articles, which were executed in *Spain*, and consequently makes it incumbent upon her to produce them: now the custom of *Spain* is, to deposit articles, and other deeds, in places appointed for that purpose, so that an authentic copy was all that could be had; and she was permitted to amend her answer, so far as to set forth the custom of *Spain*, with regard to the depositing of deeds.

2 Atk. 294.

At the hearing of a cause, it appeared by the office copy and the answer on the file, that the defendant admitted he had sold *her* shares in the *Welsh* Copper Company; in the original draft the word *ten* was used instead of the word *her*; on full affidavits by the solicitor and his clerk, that this was only a mistake in the person who engrossed the answer, and the foul draft being produced; upon solemn debate before the Lord Chancellor, assisted by the Master of the Rolls, the Court gave the defendant leave to amend the answer and swear it over again, though no precedent could be shewn, that this was ever done after the cause heard, and this had been before denied on a petition and on a motion.

2 P. Will. 426.

Bill claiming a remainder in fee after an entail spent. The defendant put in an answer and insisted on a fine having been levied by one of the remainder-men in tail, and claims under him; and now, before replication filed, petitioned for leave to take the answer off the file and to put in a new answer, and thereby insist on the person under whom he claims, being a purchaser for a valuable consideration without notice. And to support his petition he made an affidavit, that this new title had not been discovered, till after he put in his answer. The answer was taken off the file and the new matter added by way of addition, on payment of the costs of this application, and of the amendment.

Amb. 292.

Motion to strike out of the defendant's answer several words importing, that he had received 1300 *l.* in full for his advancement, from his father, in his lifetime, and refused to bring it into hotchpot. The defendants

Amb. 65.

defendants answer to the supplemental bill was read, in which he said, he was mistaken in the law in that point, and desired he might be at liberty to waive any admission he had made in it, and to wait till the Master had made his report.—Motion refused.

Application to amend a schedule to defendant's answer, an indictment for perjury having been preferred, or at least threatened. Lord Chancellor refused to interfere, although he took it to be clear, that the defendant did not mean to perjure himself, as he had no interest in so doing. That question would be proper before the grand jury, who, if they thought the defendant did not mean to perjure himself, would throw out the indictment; on the other hand, if there were ground for the indictment, it would be wrong for him to interpose. A similar application had been rejected a few days before in the case of *Vaux* v. Lord *Waltham*. 1 Bro. 419. Id. ibid.

The defendant, an executrix, admitted assets of her testator, but at the same time insisted, that nothing was due to the plaintiff. By the Master's report a large sum of 1000 *l.* and upwards appeared to be due to the plaintiff; whereupon the defendant applied for leave to retract her admission in her answer, on affidavit, stating her reasons, which were very strong, for believing, when she put in her answer, that nothing was due; and that on that account she had been advised by counsel to make such admission. This was confirmed by affidavit of her counsel and solicitor; she swore that she had but 400 *l.* unadministered and offered to be examined on interrogatories. Lord Chancellor allowed her to swear her answer *de novo*, admitting assets to the amount of 400 *l.* with liberty to the plaintiff to examine her as to assets *ultra*. Doyley v. Crump. July 18, 1789.

Motion to amend an answer after replication, upon affidavit, that the defendant was informed, that he had a good defence, (*viz.* a *modus*,) and had not inserted it in his answer, not being able at that time to set forth the *modus* with precision. Motion refused. 2 Anst. 363.

Upon discovery of new matter, in an account, a supplemental answer was permitted to be filed, after replication. Id. ibid.

The Court of Exchequer never suffer an answer to be amended, but will sometimes permit a defendant to file a supplemental answer. 3 Anst. 717.

APPEAL.

To what court.

[IF either party thinks himself aggrieved by a decree of this Court, he may by petition appeal to the Lords in Parliament, and have the cause reheard there, and they will affirm, alter, or reverse the decree, as they see fit.]

Before decree executed.

[And this may be done either before or after the decree is executed.]

Rehearing.

[Sometimes a rehearing before the Chancellor of a cause heard before the Master of the Rolls is called an Appeal.] *Vide* Rehearing.

Deposit.
Curs. Can. 404.

By an order of the 12th of *May* 1686, no rehearing or appeal was to be, except the appellant should deposit 5*l.* to recompense the other party his costs, in case he failed in his appeal; but this is now made 20*l.*

Evidence.
1 Vern. 443.
Gilb. Eq. R. 151.
2 Vern. 463.
2 Atk. 408.
Prec. in Ch. 496.

Upon an appeal from the Rolls, the appellant may be let into new evidence, which was not read there, provided he will give up his deposit. *Contrà, Prec. in Ch.* 295.

But otherwise on an appeal to the Lords.

1 P. Will. 329.

No words in a grant from the Crown can deprive a subject of his right to appeal: much less if the grant be silent in that particular.

To what court.
2 Will. 262.

An appeal from decrees made in the plantations lies only to the King in council.

In what cases.
3 P. Will. 242.

An agreement was signed by the parties, and by consent made an order of Court, to submit to such decree as the Court should make, and neither party to bring an appeal; yet the cause allowed to be reheard.

1 Eq. Ca. Abr. 165.
Amb. 229.

No appeal lies from a decree made by consent, though the party did not really give his consent; but his remedy is against his counsel, *&c.*

Costs.

A party cannot appeal for costs only, but in particular cases the rule may, and has been dispensed with. *Quære,* Whether it can be dispensed with, only in cases where it appears on the face of the decree that costs are improperly given, or where the merits must be gone into? *Vide Turner* v. *Turner,* 14th *May* 1726. *Carwardine* v. *Carwardine,* 19th *November* 1757. *Pit* v. *Page,* 1 *Bro. P. Ca.* 550.

2 Ves. 250.
Amb. 521.
2 Bro. 141.

An

An appeal cannot be regularly made to the House of Lords, till after a rehearing before the Lord Chancellor, if the cause was heard before the Master of the Rolls; though if a decree be made by the Master of the Rolls, and the same is signed and inrolled, such decree may be appealed from to the House of Lords, because there can be no rehearing thereof before the Chancellor. Appeal to the Lords. 1 Har. 677.

Appeals are to be signed by two counsel of character, usually such as have been concerned in the cause below, and exhibited by way of petition, and lodged with the clerk of the House of Lords, with whom the appellant is to deposit 20 *l.* to recompense the other party his costs, in case he fails in his appeal, *&c.* Signed by two counsel. 1 Ha. 677

The appeal being thus lodged and read in the house, the respondent is ordered to have a copy of the appeal, and required to put in his answer by a day fixed; and a day is appointed for hearing the cause in order as the appeals come in; and notice is given thereof to the appellant's solicitor, who may get a summons served on the other side to appear, *&c.* Respondent to have a copy of the appeal. 1 Har. 677.

These appeals can only be argued by two counsel on each side: and after hearing counsel upon the appeal, and upon the answer, the Lords order and adjudge that the decree of the Chancery be varied in such matters as their Lordships think fit, or that the petition and appeal be dismissed, and the decree affirmed with costs, *&c.* Argued by two counsel. 1 Har. 678.

A majority of the Lords finally determines the cause. How determined.

Sometimes the House of Lords direct an issue at law for trial of some point necessary between the parties; and after such trial to resort back to the Court of Chancery, for their farther direction in that matter. Ibid.

Printed copies of the appellant's and also the respondent's case are usually delivered to the Lords; which cases, before printed, are always signed by two counsel, *viz.* the plaintiff's case by two counsel, and the defendant's case by two counsel, whose respective names are printed at the bottom of the cases. 1 Har. 678.

In a case, where a party had appealed to the House of Lords from an interlocutory order made in the cause, and *after* lodging his appeal, it was Chancellor's jurisdiction suspended. 1 Har. 680.

Lord and Lady Pomfret v. Smith, at Lincoln's-Inn Hall, June 1772, coram Lord Apsley.

afterwards moved on his behalf that a receiver of the estates in question might be appointed. The Lord Chancellor said, the practice was, that by bringing the appeal before the House of Lords, the Lord Chancellor's jurisdiction was suspended only as to the matter appealed from, but not totally, so as nothing could be done in any other part of the cause not appealed from.

Ireland. Cul. Can. 405.

An appeal lies from the Court of Chancery in Ireland to the House of Lords here.

APPEARANCE.

When.

[A DEFENDANT is not bound to appear till the return of the process, though he be served with it ever so long before.]

[If a defendant within 20 miles of *London* be served with a *subpœna ad respondendum* the morning of the return, he hath four days after the return to appear in.]

[1 Prax. Alm. 5. Ord. Ch. 95.]

[If he be served within four days before the day of the return, he hath four days from the day of service; if served four days, or more, before the return, he must appear the second day at fartheſt after the return.] *He must now appear on the return-day.*

Hind. 93.

[If above 20 miles from *London* a defendant be served with a subpœna, either on the morning (*i. e.*) before 12 of the clock of the day of the return, or within 8 days before the return, he hath in each case 8 days from the service to appear in.]

[Ord. Ch. 95.]

[If the bill be not filed in time, the defendant is not bound to appear till it be.]

[Ibidem.]

[If the subpœna be returnable *immediatè*, yet the defendant hath the same time from the service to appear in as before, *viz.* within 20 miles four days, above 20 miles eight days.]

[Ibidem.]

[Said, No subpœnas to answer are made returnable immediate in term-time.]

[2 Toth. 9.]

[Where the subpœna is returnable on the last return-day of the term, suppose *Quindena Martini*, the defendant

[Com. Att. 24. 2 Prax. Alm. 77.]

defendant is at liberty to appear the first return of the term following.]

[But where the subpœna is returnable on a day certain, though it be the last day but one of the term, the defendant is bound to appear as of that term.] [Com. Att. 24. 2 Prax. Alm. 77.]

[No clerk, or other, shall appear upon a counterfeit subpœna.] [Ord. Ch. 86.]

[The bill being filed, if the defendant doth not appear in due time, as aforesaid, an attachment (upon affidavit, that the subpœna was served) may be awarded against him; which must be entered in the register's book, with the cause of its being issued.] Attachment for want of appearance. [Com. Att. 419.]

[If both husband and wife are served with a subpœna, or if the husband be only served, and hath notice that his wife is also a defendant, he must appear for both, else an attachment may in the first place go against both, and in the latter against him.] Baron and Feme. [Toth. 11.]

Bill against husband and wife: the husband only appeared and put in a demurrer in their joint names for the non-appearance of the wife; attachment against both. [Ca. 55. 92.]

And in all cases after due service, the process of contempt may be awarded against the husband for the default of the wife, unless an order be obtained for the contrary. Hind. 94.

If a bill be brought against baron and feme, for a demand out of the separate estate of the feme, and the husband is beyond sea, and not amenable by the process of the Court, yet if the wife be served with a subpœna, she must appear and answer plaintiff's bill. 2 Vern. 613. Prec. in Ch. 328.

Bill against husband and wife; process of contempt issued against both, upon which the wife only was taken, and gave a bail-bond for her appearance, and appeared for herself only, and afterwards obtained an order for time to answer separately from her husband, who was abroad. Lord *Hardwicke* was of opinion, that after appearance it was too late to complain of any irregularity in the service of process, the irregularity being waived. 3 P. Will. 38. 1 Ves. 383. 386.

[*A.* and *B.* are named defendants in a subpœna; *A.* only served: *B.* got the subpœna in his hand, and Subpœna. Service.

[Prac. H. Ch. 225.] for want of a bill got costs, which costs, upon shewing the matter to the Court, were discharged.]

[One served with a subpœna, upon the return thereof found no bill filed: upon his making oath that he knew no such person as him, who was named plaintiff, the Court ordered him who served the subpœna to pay costs.] [Cary 92.]

[The bill was in the name of *A.*, *B.*, *al' C.*, the *subpœna* only *ad sectam A. B.* The defendant got costs for want of a bill, as he supposed: but the Court ordered the costs, and the attachment for non-payment thereof to be discharged.] [Prac. H. Ch. 259.]

As to method of entering Appearance, *vide Hind.* 95.

Injunction. The statute of *Ann.* permits a subpœna to issue before the bill is filed, where an injunction is prayed, or to stay proceedings at law; in such cases the bill need not be filed before the day on which the subpœna is returnable, and defendant cannot prefer costs until the day next after the return; if the clerk in court for the defendant to any other bill searches the office before the *subpœna* is returnable, and no bill be filed, he may take the necessary steps to prevent the bill being antedated, and at the return-day prefer costs. The bill not being filed on the return-day, defendant need not appear, and plaintiff cannot attach; but must serve defendant with process *de novo.* Hind. 96.

Stat. 5. Geo. 2. Appearance entered for a defendant neglecting to enter it. By statute 5 *Geo.* 2. *c.* 25. § 2. if any defendant or defendants, by virtue of any writ of *habeas corpus*, or other process, issuing out of any court of equity, shall be brought into court, and shall neglect or refuse to enter his, her, or their appearance, according to the rules or method of such Court, or appoint a clerk in court to act on his, her, or their behalf respectively, such Court may appoint a clerk in court, or attorney, to enter an appearance for such defendant or defendants respectively; and such proceedings may thereupon be had in a cause, as if the party had actually appeared.—*Sect.* 3. Persons in custody so refusing to appear are to be served with a copy of the decree, before any process can be taken out to compel the performance thereof.

Irregularity. An order had been obtained by contrivance under the statute of 5 *Geo.* 2. The defendant appeared to

the bill; the Court on application set aside the order; for though an appearance, where it is *only irregular*, salves error in process, yet where the order, which occasioned the appearance, had been obtained by malpractice, the appearance will not salve a defect of that sort. The solicitor was committed for obtaining this order in an undue manner. Barnard. 402.

A member of the House of Commons regularly served with an office-copy of the bill signed, together with a *subpœna*, and refusing or neglecting to appear, must be proceeded against by sequestration: upon an affidavit of service, a sequestration must be moved for against the defendant's real and personal estate (which the Court will grant of course) unless the defendant, being *personally* served with such order, shall within eight days after such service shew good cause to the contrary: and if after personal service of this order *nisi* the defendant persists in his contempt, the order for a sequestration will be made absolute upon motion, grounded upon an affidavit of the service of the order *nisi*; and the clerk in court having the order left at his seat will make out the sequestration which the Court will in nowise discharge, until the contempt be cleared and the costs paid, upon the performance of which the sequestration will be discharged by the adverse clerk in court, or solicitor, or in default upon application to the Court. Member of Parliament. Hind. 97. Hind. 98.

The personal service of the order *nisi* for a sequestration may be dispensed with, if the defendant keep within his house or cannot be served personally; by application to the Court grounded upon an affidavit stating the fact, which, if it be deemed satisfactory, service, by leaving the order *nisi* at defendant's house, will be substituted instead of personal service. Sequestration. Hind. 98.

Where a bill is brought against an infant, he must, if in town, appear in court, and have a guardian assigned him, by whom he may defend the suit; if the infant reside in the country, he sues out a commission to assign a guardian. Where the infant neglects to appear, on affidavit of service, an attachment against the infant is awarded, though never executed, and it is a motion of course to move upon the attachment for an order for the messenger to bring the infant into court. This order must be drawn up, passed and entered at Guardian. Infant. Hind. 98.

the Register's office, and given to the messenger of the court, who thereupon procures a warrant, the form of which is in *Hind.* 98.

Hind. 99. Upon this warrant the messenger brings the infant into court, and the Court being apprized thereof by counsel, assigns the senior six clerk, not towards the cause, to be guardian, to appear and defend the suit, if no friend or relation will undertake the guardianship.

Appearing gratis. 2 P. Will. 368. An order for appearance *gratis* implies the words that the defendant shall pray no day over.

Process. 1 Ves. 395. Prec. Ch. 99. Gilb. Ch. 41. One defendant not appearing; the whole line of process being gone through against him, is equal to the proceeding to outlawry at the common law; and there may be a decree against the other defendants, who have appeared.

Bill of revivor. 3 Atk. 690. Bill of revivor not taken *pro confesso* against a defendant, a prisoner in *York* gaol, for want of an appearance. Plaintiff must proceed under 5 *Geo.* 3. *c.* 25. which, as now settled, extends to bills of revivor.

2 Bro. 127. So, when defendant, who has appeared to the original bill, cannot be found to be served with subpœna to answer bill of revivor.

ARBITRIMENT AND AWARD.

Stat. 9 Will. [BY the 9th of *Will. cap.* 15. merchants or others may make their submission to arbitriment a rule of any of the King's Courts of Record, *&c.*]

Submission. 3 P. Will. 361. After an award made, it is too late to confirm the submission, so as to make it good within the act.

Set aside. 2 Ves. 317. There can be no *motion* to set an award aside, unless it has been made a rule of Court.

Contempt. 2 Atk. 396. Where a submission to an award has been made a rule of Court, it is a contempt of Court to dispute the order, unless for partiality, corruption, or misbehaviour of the arbitrators.

When set aside. [If an award be made without hearing bo arties, or if any fraud or apparent injustice be used, this Court will set it aside.]

[The

[The defendant's plea being allowed, he moved to diſſolve the plaintiff's injunction. The Court ſaid, when the plea is allowed there is ordinarily an end of the injunction; but not always: the defendant here had pleaded only what the plaintiff had confeſſed and ſet forth, viz. an award; and though the defendant and the referee had denied all practice, and ſwore that the plaintiff was heard, and the award duly obtained, and denied all his equity; yet it was ſaid, practice or unfair proceedings are often found in awards. The counſel for the defendant ſaid, the other ſide ought to ſhew ſome equity confeſſed or allowed in the anſwer: but were anſwered by the Court, that though awards are favoured here, becauſe they tend to ſettle peace amongſt the parties; and although there be notice of this motion, yet an injunction is not to be diſſolved upon the allowance of the plea; but only *niſi*, becauſe there may perhaps be ſome equity ſhewn to continue it.] Plea. Injunction.

[The Court, however, ordered the money awarded to be brought into court by the firſt ſeal, or the injunction to ſtand diſſolved without further motion; the plaintiff to enter up his judgment, (having at law a verdict,) and to tax his coſts, which were alſo to be brought in; but to ſtay execution.]

[Though the Court ſeemed willing to have had him forbear entering judgment.]

[Commiſſioners appointed to examine witneſſes, certified under their hand, that both parties ſubmitted themſelves to their determination, and that by both their conſents they ordered, *&c.* Whereupon the Court awarded a *ſubpœna* againſt the defendant, to ſhew why that order or award ſhould not be decreed.] [Parc. H. Ch. 164.]

Decrees to pay money under an award not uſual, becauſe awards are commonly to pay money, in which caſes a bill in equity to compel a performance is improper; but when it is to do any thing in ſpecie, then a bill is proper. Bill to perform award. 3 P. Will. 187. 190.

A party ſubmitting to an award, deſired the arbitrator to defer making his award, until he ſhould ſatisfy him as to ſome things, which the arbitrator took to be againſt him, though this was within two or three days before the time of making the award was out; yet the requeſt not being complied with, the award was held ill. When ſet aſide. 3 P. Will. 361.

If

When bad. 2 Vern. 515.

If there are three arbitrators, two cannot make an award without the third.

An award without hearing both parties, though just, is not good, for it is good by accident; if one arbitrator makes improper declarations, he will be made to pay costs, and satisfaction decreed to be acknowledged on the judgment on the bond of submission.

2 Ves. 316.

1 Atk. 64.

Where arbitrators are deceived, or where they make their award clandestinely without hearing each party, the Court will interpose and avoid such award.

When a bill will lie to execute an award. 1 Atk. 61.

A bill will not lie to carry an award into execution by persons who are not parties to the submission; for as they are not obliged to abide by the award, they ought not to have the benefit of it; as where creditors, who are not parties to the submission, file a bill to have an award, which had been made between copartners their debtors, carried into execution.

An award made a rule of Court of King's Bench, according to submission for that purpose, and an attachment *nisi* granted for not obeying the award. Bill suggesting fraud and corruption in the arbitrators, and praying that the award be set aside, is improper: the proper way would have been to have shewn cause in the Court of King's Bench, why the attachment should not be made absolute.

2 Atk. 155.

3 Atk. 494.

If arbitrators are mistaken in a plain point of law, it is a ground to set aside the award; but if it had been a doubtful point, the award might have stood though the Court should be of a different opinion.

Id. 529.

The only ground to impeach an award is, collusion or gross misbehaviour in the arbitrators; for otherwise, being made by judges of the parties own choosing, it is final and binding, or persons would never consent to become arbitrators.

On a bill to set aside an award, plaintiff is not suffered to go into legal objections, but only for partiality and corruption, unless an account is prayed, and omissions in an award, by which the balance is turned the other way, are stated; but the award is not set aside *in toto*.

Amb. 246.

Award pleaded. 2 Atk. 395.

Where the parties have agreed to make the submission to an award a rule of Court, and to be restrained from bringing a bill in equity, the arbitrators, notwithstanding the award may be defective

in

in point of law, may plead it in bar to a bill in equity.

Arbitrators may plead an award in bar to a bill charging partiality, but they muſt ſupport their plea by ſhewing themſelves impartial. 2 Atk. 396.

An arbitrator, upon a bill being filed againſt him charging partiality, moved that he might be ſtruck out from being a party, and it was ordered accordingly. *Sed quære.* Ibid.

Though plea of an award to a bill, brought for a general account, and to ſet aſide that award, be allowed as to the account, yet plaintiff at the hearing may object to the award for fraud or partiality in the arbitrators. 2 Atk. 501.

Improper to come into a court of equity merely for an objection to an award in point of form. Power of arbitrators. 2 Atk. 504.

If arbitrators delegate their authority, the award is totally void.

But if they refer coſts to be taxed, it will not vitiate the award. Ibid.

The Court will not raiſe a preſumption to overturn an award. Preſumption againſt award.

Where an award is good to a common intent, and anſwers the purpoſe of parties ſubmitting to a reference, the Court will not ſet it aſide upon trivial objections.

Arbitrators need not point out the particular method in which the award is to be carried into execution. 2 Atk. 502.

Where arbitrators have awarded releaſes, leaving it to the Court to ſettle the form does not vitiate the award. Releaſe. 2 Atk. 506.

Plea to a bill for an account of partnerſhip, that all matters in controverſy were to be determined by arbitrators, allowed; if it were neceſſary for the information of the arbitrators that there ſhould be a diſcovery, the bill ſhould ſtate that fact: but the Court ought to ſee that the abitrators could not proceed before it entertains juriſdiction of the matter; the firſt appeal ſhould be to the judges pointed out by the articles of copartnerſhip. *Vide 2 Atk.* 569. *contrà.* Plea. 2 Bro. 336. 4 Bro. 311. 2 Ves. jun. 129. S. C.

Defendant is not obliged to ſet out the account between him and the plaintiff, after an award in his favour relating to that account; for a plea of an award is good not only to the merits, but to the diſcovery. Plea. 3 Atk. 530.

Arbitrators

Conduct of arbitrators. 3 Atk. 530.

Arbitrators are not bound to give notice of the time they intend to meet, or the particular place where.—*Sed quære.*

Plea. 3 Atk. 644.

To a bill against an arbitrator for a discovery of the grounds upon which he made his award: he pleaded in bar that he was not bound to set them forth. Plea allowed.

[Ibid.]

If there be a mistake or miscalculation in an award, the party aggrieved may bring his bill against the party in whose favour the award was made, and not against the arbitrator.

Exceptions. 3 Bro. 364.

Exceptions will not lie to an award, as the same topics would be a ground to set aside the award. 1 *Vern.* 469. 2 *Vern.* 109. *contrà.*

Exceptions will lie to an award, but they must be to matters on the face of it, and not to matters of fact, of which the arbitrators are the proper judges: it is not necessary for arbitrators to set forth in schedules the balances of the particular accounts which make the general balance. What is done by arbitrators is conclusive: if parties mean the reference to arbitrators to be the same, as it would be to a Master, they must provide for it; if there is any thing in an award that should not be in it, or any thing omitted which ought to be there, that being on the face of the award is matter of exception; but where the objection arises from matter *dehors* the award, it must be made on motion and affidavit.

4 Esp. 120. 2 Ves. jun. 23. S. C.

Plea. 3 Bro. 196.

Plea of an award and release good to a bill seeking to open an account, and charging that the award, which was pleaded, would not have been made, if papers required by the bill had been produced.

When made. 3 Bro. 358.

The submission to an award was, that it should be made on or before *Michaelmas* term: the time was enlarged *till* the first day of *Hilary* term, the award was made the first day of *Hilary* term, and the word *till* is for this purpose inclusive.

Non-performance of an award. 3 Bro. 358.

Where there is a non-performance of an award the proper motion is, that the party may stand committed, and not for an attachment; but the notice of motion must be served personally.

Award not like a judgment.

One of the parties to an award made on a submission in court pursuant to the act of Parliament, dies before the money paid, an attachment having previously

previously issued against him. A *scire facias* cannot go against his heir or executor: for the award, though established by the Court, is not in the nature of a judgment, or decree to be prosecuted, but in nature of a contempt which dies with the person; and so held all the Judges. Prec. in Ch. 223.

An arbitrator ought not to consider himself as agent for the person who appoints him: the bond says, he is an indifferent person, and he breaks a most solemn engagement in considering himself otherwise. Conduct of arbitrators. 1 Ves. jun. 286.

In an account several errors were assigned, and allowed by the Master, to a great amount; but upon a reference to arbitration it was determined to be perfectly free from error and over-charge in every particular. Cross-motions to set aside the award, and to confirm it, the last of which was supported by affidavit of the arbitrators, that upon full investigation the account was not erroneous. The parties bound by the award. Affidavits were not read against the affidavit of the arbitrators; the Court being inclined to think that they ought not. Motion to set aside award. 1 Ves. jun. 365.

On a general reference of *all* matters, &c. arbitrators may go farther, than the Court could, to do complete justice: and may relieve against a harsh right, which in a court of justice would prevail. Power of arbitrators. 1 Ves. jun. 369.

An award may be impeached for corruption, or gross mistake, not for erroneous judgment: but in case of mistake, it must be made out to the satisfaction of the arbitrator; and the party must convince him of his error, and that he acted upon it. Mistake. 1 Ves. jun. 370.

An arbitrator, on a reference to inquire into facts, is as a Master, and the Court will draw the conclusion; but if he has, the Court will see that it is right. Ibid.

An award upon a general reference is not to be impeached by exceptions, but upon cross-motions, to set it aside and to confirm it. Exceptions. Ibid.

Upon a reference to an arbitrator in the character of a Master, exceptions may with leave of the Court be taken to an award; and if they be allowed, the Court will refer it to a Master, but will not send it back to the arbitrator without consent. 1 Ves. jun. 370. note.

An award upon a general reference, not impeached upon an erroneous judgment upon facts; but may May be impeached for mistake.

for

2 Ves. jun. 15. for corruption, misbehaviour, excess of power, and mistake admitted by the arbitrators; in the three first cases, there must be satisfactory evidence against them; for the Court favours awards.

Excess of power. An award contrary to law may be impeached, for that is excess of power; but not for allowing compound interest; for it may be allowed in case of a contract for it, either express, or to be inferred from the nature of the dealings between the parties; therefore it is a conclusion of fact, upon which the judgment of the arbitrators is final; but this doctrine as to interest has no relation to mortgages.

Ibid. 16.

A mere agreement to refer to arbitration, where no reference has taken place, cannot take away the jurisdiction of any court.

2 Ves. jun. 136.

Fraud. Bill lies to set aside, for fraud, an award made a rule of a court of law under 9 & 10 *Will.* 3. *c.* 15. for the jurisdiction of this Court is not barred by a reference under the statute, and that which would subvert the award may arise out of the answers.

Ibid. 451.

Ibid. 451. Awards made in causes depending, are not awards to which the statute relates.

Ibid. Upon an award being made a rule of a court of law on terms, one of which is, that no bill in equity shall be filed: the court of law may enforce that term or not, as it pleases.

Costs. A submission to arbitration in a cause in the Exchequer was made a rule of the Court of King's Bench, and by the award the costs were to be taxed by the Master of the Exchequer. Motion, that the taxation might be reviewed, refused; the Court thinking that it had no jurisdiction.

1 Anst. 273.

Submission of all matters in difference, all suits at law, and equity, and costs, *&c.* Award of *costs at law* to defendant, in equity, and that all suits at law and in equity between the parties should be *discontinued.* Motion to dismiss the bill in equity refused; the application must be to the Court, in which the submission was made a rule, for an attachment, if the plaintiff proceeds in his suit.

2 Anst. 361.

Plea. Bill stated an award, and that no provision was made for a particular event, which had taken place, and by which the plaintiff was damnified. Plea, the award. The bill ought to have expressed *particularly* the damage sustained by the plaintiff. The plea allowed.

Ibid. 519.
3 Anst. 637. S.C.

Bill

Bill to set aside an award, stating, that the defendant had wilfully misrepresented many things, and concealed others, and that the plaintiff had not till lately discovered the fraud. Plea of the award alone overruled, as the charge of concealment was not denied. Fraud. Plea. 3 Anst. 735.

ATTACHMENT.

VIDE

Proclamation.

[IS a writ directed to the sheriff, commanding him to attach, *i. e.* take a person, so as he may bring him into court at a certain day, to answer a contempt.] What.

[As this process is always founded upon some contempt to the Court, so it is most commonly for not obeying the process or orders of the Court.]

[No clerk of this court shall issue any attachment for not appearing, but upon affidavit first made, positive and certain, of the day and place of service of the *subpœna*, and the time of its return, whereby it shall appear, that such service was made; if in *London*, or within 20 miles thereof, four days at least, and if above 20 miles, then eight days before such attachment entered, excluding the day of service.] When it shall issue. [Ord. Ch. 95.]

But it has been held, that where a man has been arrested upon an attachment, the contempt shall hold good, though no affidavit be filed at the time of taking forth the attachment, if it be filed before the return of it. 1 Vern. 172.

[The register shall not enter in his office any common rule or attachment issuing from the Six Clerks' office, but by a note under the clerk's own hand that is attorney in the cause, or his agent or deputy by him appointed, or for whom he will answer.] To be entered with the register. [Ord. Chan. 46.]

[The clerks in court shall carefully see, that all attachments be duly entered with the register, according to the ancient course of the Court.] [Ibid.]

[The Court refused to make any order for an attachment on *affidavit* of breach of an injunction; for the

the clerk in court is to do it of course, if he see cause, on a sufficient *affidavit*.]

Irregularity. Vexation.

[A defendant was in contempt; the plaintiff sued an attachment into *Kent*, and another into *London*; and arrested the defendant on each. Upon shewing this to the Court, costs were ordered to be taxed by a Master for the irregularity and vexation; but in regard the plaintiff was poor, the Court, on his prayer or motion, ordered the costs to be paid the defendant out of 600 *l.* decreed the plaintiff, and resting in court; and the defendant was set at liberty without entering his appearance with the register. For the Court said, none should take advantage of his own wrong.]

Discharged. Costs. Ord. Ch. 95

[An attachment duly issued shall not be discharged, but upon payment of usual costs, &c. and the costs of the succeeding process of contempt shall be double the former.]

Return.

[If the sheriff return a *non est inventus* on the attachment.]

Attachment with proclamation.

[Then issues an attachment and proclamation.]

Messenger.

If the sheriff return *cepi corpus*, a messenger must be moved for to bring up the defendant, if he will not answer below; for the sheriff has executed the command of the writ, by taking the body, and he cannot carry the defendant out of the county; if he did, he would be liable to an action for an escape; but when defendant is in custody, and there are other detainers against him, then a *habeas corpus cum causis* must be moved for, upon which he is brought up and turned over to the Fleet prison.

Hind. 101.

Vern. 345.

When a *cepi corpus* is returned upon an attachment, there is an end of all process (for no proclamation or commission of rebellion goes after that); and though a messenger of late has been usually granted, yet he is but a new officer, and subordinate to the serjeant at arms; but regularly in such case a motion should be made, that defendant may enter his appearance, and be examined within four days or stand committed.

Messenger. Cepi corpus returned.

The sheriff having the body in custody upon an attachment, took a bail-bond for his appearance, which he delivered to the plaintiff, who obtained a rule *nisi* for the sheriff to bring in the body. Lord *Hardwicke*

Hardwicke allowed the cause shewn by the sheriff and discharged the rule; for the plaintiff is not without remedy, as he may have a messenger into the county where the person lives, which is now a motion of course upon a *cepi corpus* returned, though formerly the Court allowed messengers to those particular jurisdictions only, where the sheriff had the amercements; but the rule now is to send a messenger into every county generally without any distinction.

2 Atk. 507. 2 Bro. 181. 1 Vern. 116. 154. 2 P. Will. 301.

All process of contempt shall be made out into the county where the party prosecuted is resident, unless he shall be then in or about *London*; in which case, it may be made in the county where the party then shall be; and if any person shall be taken upon process otherwise, or irregularly issued, the party so taken first appearing unto and satisfying the process, which did regularly issue against him, shall be discharged of his contempt and have his full costs, to be taxed of course by the six clerk (*but now by the Master*) not towards the cause, for such undue or irregular prosecution, from the time that the error first grew, without motion or other order.

Process of contempt, how made out.

Ord. Cha. 112.

Every suitor who prosecuteth a contempt, shall do his best endeavour to procure each several process, to be duly served and executed upon the party prosecuted; and his wilful default appearing therein to the Court, such person offending shall pay unto the party aggrieved good costs, and lose the benefit of the process returned without such endeavour.

Default in executing the writ. Or. Ch. 112.

All attachments in process shall be discharged, upon the defendant's payment, or tender to the plaintiff's clerk, and refusal of the ordinary costs of the Court, and filing his plea, answer, or demurrer (as the case requires); but yet upon motion in court, or petition in that behalf.

Discharged costs. Ibid.

And if after such conformity or payment of costs (or tender and refusal thereof) any farther prosecution shall be had of the same contempt, the party prosecuted shall be discharged with costs.

Ibid.

No process of contempt shall be made forth and sent to the great seal, at the suit of any person prosecuting *in forma pauperis*, until it be signed by the six clerk, who deals for him, and the six clerks are to take care that such process be not taken out needlessly or for vexa-

When to be signed by the six clerk.

Ord. Chan. 125.

vexation, but upon just and good grounds; as they will answer it to the Court, if the contrary should appear.

Serjeant at arms. Sequestration. 1 Vern. 344.

If after an arrest upon an attachment and a *capi corpus* returned, the defendant escapes out of the kingdom, a serjeant at arms shall be granted, and upon return a sequestration.

Prisoner. Sequestration. Mos. 301. 3 P. Will. 55.

An attachment for non-performance of an order against one in the Fleet, is directed to the warden of the Fleet; and on his return that he is a prisoner, you may move for a sequestration.

When a bail-bond may be taken. Prec. Cha. 331.

A bail-bond cannot be taken by the sheriff upon an attachment for non-payment of costs; but in such case a messenger is to go to bring in the party.

Contempt. 1 Atk. 58.

A contempt for non-performance of an order of this Court is a breach of the peace, and a man may be taken upon a *Sunday* upon an attachment for such contempt.

Attachment for costs. Barn. 266.

A solicitor must serve his client with the order for taxing his bill of costs, and the Master's report, whereby such costs are ascertained, before he can take out an attachment for them.

Serjeant at arms. 2 P. Will. 657.

Every attachment returned, on which a serjeant at arms is grounded, must be entered in the Register's office, else irregular.

Granted against a solicitor. 3 Atk 568.

An attachment may be granted against a solicitor for negligently managing his client's business.

Subpœna served abroad. 4 Bro. 213.

Motion for an attachment to take a defendant, the subpœna having been served abroad, and a case being cited in the year 1780 of *Burke* v. Lord *Macdonald*, where the like order had been made. Lord *Thurlow* thought the service of the subpœna abroad a good service, and made the order accordingly.

Contempts pardoned. Ca. in Cha. 238.

Process issued till proclamation was returned, then came the general pardon. The defendant appeared and demurred: the plaintiff moved to set aside the demurrer; for though the contempt was pardoned, yet the delay was no less to the plaintiff. Lord Keeper said, the defendant was *rectus in curia*, all contempts were pardoned and refused the motion.

Irregularity. Hind. 103.

If an attachment be irregularly obtained, it may be discharged upon motion.

Contempts pardoned.

The defendant was adjudged to pay to the plaintiff 40*s*. costs, for suing out process of contempt against him,

him, being discharged by her Majesty's general pardon. Ca. 79. Toth 48.

When you make out an attachment returnable three or four days after the *teste*, if you arrest the party, it is good; but if you let the return expire, and nothing is done upon it, and then make out another attachment, here you will be allowed in costs but for one writ, in case the party be taken upon the second; for there must be fifteen days between the *teste* and return of each process, where the plaintiff intends to sequester defendant's effects; and if, in proceeding thereto, the defendant be taken, he must pay obedience to the rules and orders, or perform the duty decreed by the Court, and pay costs of the process, before he can be discharged. Fifteen days between the teste and return of each process. Hind. 106. Where a sequestration is intended. Hind. 106.

When the party is taken upon an attachment, he must pay costs, which are 13*s.* 6*d.*, and enter into a bail-bond, with two sureties in 20*l.* each, to the plaintiff, to appear and answer, as the case is, at the return of the writ, where the contempt is of a bailable nature. If the writ be not executed, the costs are 11*s.* Costs. Hind. 106.

In all cases where the sheriff does not make his return of the writ, if directed to him, this Court upon motion, will make an order upon him to return the writ at a day certain; and upon affidavit of service, and his refusal or neglect so to do, will amerce him; which amercement is generally 5*l.* and is to be estreated into the Exchequer, or order him to stand committed to the Fleet prison. Sheriff amerced for not returning the writ. Hind. 107.

The warden of the Fleet attends this Court, and the Court of Exchequer by two deputies; and therefore no attachment will be against him, because he is supposed to be always personally present in court; a sequestration *nisi* for want of an answer was moved for against the warden. *Per Cur.*—It is common to suspend clerks of courts and the warden of the Fleet; take the order for a sequestration, which is a kind of suspension *nisi*. Warden of the Fleet. Mos. 238.

An attachment for non-appearance was taken out before the bill was entered in the bill book, though filed in the six clerks' office. Lord Chancellor seemed to think an entry in the bill book necessary to give the party notice; for private notice to his attorney is Appearance. 1 Ves. 53.

not sufficient: but being doubtful of the course of the Court he referred it to a Master.—It is not the practice now to take out the *subpœna* before the bill filed.

When returnable. Hind. 100.

This writ must be made returnable in term, and there must be fifteen days between the *teste* and return in proceeding to a sequestration, or to take a bill, *pro confesso*, unless defendant live within ten miles of *London*, and then an order may be obtained by motion or petition to make the several processes of contempt returnable *immediatè*.

How directed. 1 Harr. 233.

In this writ of attachment, and all other writs, regard is to be had to the jurisdiction and privileges of certain places, as the *Cinque Ports* and the counties palatine of *Lancaster*, *Chester*, and *Durham*; and the direction of the writs in such cases is of a peculiar form; as, for instance, where an attachment issues against an inhabitant of *Hastings*, *Rye*, *Romney*, &c. it is directed to the Lord Warden of the *Cinque Ports*; if to *Lancaster*, *Chester*, or *Durham*, it must be directed in a different manner. *Vide Harr.* 233.

Two attachments for debt and costs. 2 Anst. 381. 413. S. C.

In the Exchequer, the plaintiff, after a decree in his favour, took out two attachments, one for the debt, the other for the costs against the defendant, and held regular.

Demise of the crown.

By stat. 1 *Ann. c.* 8. *s.* 5. it is enacted, That no proceedings in any court of equity shall be determined, abated, or discontinued, by the demise of any king or queen of this realm.

BAIL.

[BAIL in this Court is discharged upon bringing in the principal, as in the civil, and at the common law.]

BARON AND FEME.

VIDE

Executors.

[THE husband ought to cause an appearance for his wife as well as himself.] Appearance. [3 Px. Alm 42.]

[In some cases the wife hath been committed without her husband.] *This does not appear from the case in Cary.* Commitment. [Car. Rep. 92]

[If in a suit here the wife be in contempt for any matter, the husband is also ordinarily liable to process of contempt and commitment, as the case requires.] Process. [Toth. Diversis locis.]

[Said, you cannot regularly serve the wife with a subpœna *ad respondendum* without her husband, though the matter in question do only concern her.] [2 Toth. 13.]

[Though ordinarily the wife must not answer alone, yet where the plate had (many years before) been deposited with her, and the bill was brought against the husband and her, and he being in *Ireland*, could not be brought to answer, she was ordered to answer alone.] Answer.

[And frequently the wife is put to answer alone, if the husband is beyond sea.] [Toth. 13.]

[Where the wife lives separate from the husband, she is often ordered to answer alone.] [1 Ch. Rep. 68.]

If a wife cannot in conscience consent to such an answer, as is drawn up by her husband, she is not obliged to submit to it; but upon application to the Court, she may be considered as a separate person, and will be allowed to answer separate and distinct from her husband. Answer. 2 Atk. 50.

If a husband insists that his wife put in an answer contrary to what she believes to be the fact, and by menace prevails upon her to do it; this is an abuse of the process of the Court, and he may be committed for the contempt. Ibid.

[If she answers alone without leave or order of the Court, the answer will be quashed upon motion]: for regularly the answer of a feme covert, if separate, ought to have an order to warrant it; but if the feme covert's separate answer be put in without an order, and the same be a fair and honest answer, and deliberately 2 P. Will. 371.

berately put in with the consent of the husband, and the plaintiff accepts it, and replies to it, the Court will not at the motion of the wife, or her executor, set it aside.

Plea. Process. [1 Ch. Ca. 296.] [Toth. 15.]

[A bill was against husband and wife, daughter of the plaintiff: the husband put in a plea in the name of himself and wife, and swore it, but the wife would not be sworn: he moved, that the plea might be accepted, suggesting the wife refused by combination with another. It was ordered the plea should stand for the husband; the plaintiff to proceed against the wife by process of contempt.]

[2 Ch. Ca. 39. 173.]

[The wife's answer differing from her husband's shall not prejudice him; as where she is executrix and confesseth a trust, which he denies, one witness is not sufficient to prove the trust.]

2 P. Will. 451.

A feme covert cannot bind herself by her answer, much less her husband as to her inheritance.

Answer. 3 P. Will. 238.

Baron and feme defendants to a bill; the feme must answer, though the answer cannot be read against the husband, but may possibly be read against her, if she survive: but she is not bound to answer if tending to subject her to a forfeiture, though the husband has submitted to answer.

Witness. 2 Vern. 79.

A wife cannot be examined as a witness against her husband.

Decree. [2 Ch. Ca. 173.]

[Said, no decree can be had against a feme covert for her inheritance, if the husband will not appear; for her answer is no answer without his.]

Bill. [Toth. 95]

[Husband and wife ought ordinarily to join for things in right of the wife (as at law,) but sometimes the wife by her next friend sues the husband for performance of a marriage settlement, or such like; and sometimes petitions against him for alimony, where he turns her away, or she goes away upon ill usage. And a feme covert has been allowed to sue here in her own name, when the husband was beyond sea.]

[Ibid. 96.]

[So in case where the husband released.]

Abatement. [1 Ch. Rep. 68.]

[If plaintiff and defendant intermarry, the suit abates.]

[So it is, if one of the plaintiffs marry one of the defendants.]

Bill. 3 Atk. 478.

A husband bringing a bill against a wife is admitting her to be a feme sole, and she must put in her answer as such.

Sir

Sir *Robert Brooks* was plaintiff against his Lady and others; a motion was made to have her committed for not answering interrogatories, but the Court would not grant it, and declared a man could not be plaintiff in this court against his wife; this was moved again, when the Court was of opinion, that though a man could not have a bill against his wife for discovery of his own estate; yet where before marriage she enters into articles concerning her own estate, she has made herself a separate person from her husband, and therefore she was ordered to answer in a week's time. Prec. in Ch. 24.

Where a wife is executrix of a former husband, the Court will grant a *ne exeat regno* against her alone, if her second husband should be gone out of the kingdom. Ne exeat regno. 3 Atk. 409.

Ne exeat regno upon affidavit of wife against her husband refused; wife's evidence against her husband allowed only for security of the peace; but she cannot sustain an indictment against him. 1 Ver. jun. 49.

Suit in the ecclesiastical court for alimony; husband threatened to leave the kingdom; and to aid that court, and out of compassion to the wife, a writ of *ne exeat regno* was granted. *Sed quære?* 1 *Ver.* jun. 94. 2 Atk. 210.

Bill against husband and wife, and subpœnas taken out against both, and served upon the wife, but the husband could not be found, and neither of them appearing, an attachment issued against both, and the wife was taken up, who moved to be discharged on affidavit, that her husband was gone to *Holland* before the filing of the bill, and that the process against her without her husband was irregular: but the Court was of a different opinion. Attachment. Prec. in Ch. 329.

The wife cannot, either by herself, or her *prochein amy*, bring a *homine replegiendo* against her husband, for he has by law a right to the custody of her, and may, if he think fit, confine her; but he must not imprison her; if he does, it will be good cause for her to apply to the spiritual court for a divorce. Homine replegiendo. Prec. in Ch. 492.

Baron and feme defendants, the wife only appears, and that without the husband's privity, and a sequestration returned; the bill cannot be taken *pro confesso* against the husband. Pro confesso. 1 Vern. 247.

Feme sole.
2 Vern. 104.
3 P. Will. 37.
and the cases there cited.

A wife, whose husband is by act of parliament banished for life, may make a will, and act in every thing as if her husband were dead.

Death of baron.

Baron and feme exhibit a bill for a demand in right of the wife, defendants answer, witnesses are examined, and publication passes; baron dies, and the feme marries a second husband, and they bring a new bill for the same matter. It was moved to restrain them from examining the witnesses examined in the former cause, which the Court refused, for the wife was not bound by the proceedings in the former cause.

2 Vern. 197.

But where the bill was for a legacy against baron and feme, who was executrix of the testator, defendants answer, witnesses are examined, and publication passed: husband dies, the wife shall be bound by the answer and depositions; otherwise, if the wife's inheritance were in question.

2 Vern. 249.

Costs survive.
2 P. Will. 496.
3 Atk. 21. 726.

Bill by plaintiff and his wife to redeem a mortgage of the wife's estate, defendant pleads, and the plea over-ruled with 5 *l.* costs. Baron dies, the costs survive to the wife.

Lunatic.
3 P. W. 111. in notis. Ca. temp. Talb. 143.

The custody of a lunatic may be granted to a *feme covert*, though she be not *sui juris*, but under the power of her husband.

Bill.
2 Vez. 666.

A bill filed by husband and wife claiming in her right must be considered as the bill of the husband.

Affidavit.
3 Bro. 11.

The affidavit of the wife cannot be received against the husband.

Answer.
2 Vez. jun. 332.

Motion by plaintiff that a *feme covert* defendant might put in a separate answer, because her husband was a prisoner in the King's Bench, refused.

Consent.
1 Anst. 93.

The Court cannot take the wife's consent as to the disposal of her property, till the amount has been ascertained.

Where money was declared to be due to a *feme covert*, and no settlement was mentioned in the pleadings, the Court, on motion, would not direct the money to be paid to her trustees till the Master reported that there was a settlement, notwithstanding the wife was in court and consented.

1 Anst. 274.

BILLS.

VIDE

Jurisdiction.
Dismissions.

[A BILL is a petition writ upon parchment, directed ordinarily to the Lord Chancellor, Lord Keeper, or Commissioners, but during a vacancy, whilst the seal is in the Queen's own hand, to the Queen's most excellent Majesty in her Court of Chancery; shewing by whom, in what, and how the complainant is grieved or injured, or in what he wants the assistance of the Court; that he is without remedy, save in equity, or at least is properly relievable there; praying equitable relief, or aid and proper process to that purpose] What. [Prac. H. Chan. 36.]

[It must have all necessary parties, plaintiffs and defendants.] Parties.

[It must be true in substance; the matter plainly, yet succinctly alleged, with all necessary circumstances, as time, place, manner, and other incidents.] Substance true.

[It must be of a matter cognizable in this court.] Matter.

[As it must be sufficient in substance, so it must have convenient form: but this in equity is not strict or difficult.] *Vide Mit. Treat.* 41. Form.

[Every bill must be under council's hand. Said, if it be not, or the hand be counterfeit or disavowed, the bill will be dismissed on the defendant's demurrer.] Council's hand. [Px. 3.]

[In case of a bill without council's hand, anciently it hath, upon motion, been ordered, that the defendant should not answer till counsel had signed the bill.] [Ca. Rep. 160.]

[A counsel is not to put his hand to a bill (or any other pleading,) unless it be drawn, or perused by himself in the paper draught, before it be engrossed.] [Ord. Chan. 93.]

[If a bill be not succinct; or if it be stuffed with repetitions or recitals, *in hæc verba*, or other impertinences; or if it contain any thing scandalous, the counsel, who signed it, is liable to pay the party Scandalous or impertinent.

grieved costs, to be taxed by the Master, and not to be heard in court till he pay the same.]

[If any scandal is alleged to be in the bill, (either concerning the defendant or any other,) it is, upon motion, to be referred to a Master; who, if he finds it is so, is to expunge the scandal, and tax costs for the party scandalized. But if the Master reports it not scandalous, then he who procured the reference shall pay the plaintiff costs for such reference.]

[Ord. Cha. 93.]

Two bills for the same matter.

[If two bills are exhibited by the same parties for the same matter, one of them will be dismissed. *Vide* Plea. *A. B.*, as sole executor to *J. S.*, exhibited a bill against the defendants; and *A. B.* and *C. D.*, as executors of *J. S.*, exhibited another bill against the same defendants for the same matters. It was ordered that one of them should be dismissed.]

[Ca. Rep. 125.]

On motion to stay proceedings on one of two bills, which had been filed for the same purpose against the defendant; the one by the party interested himself in a copartnership account; and the other by an assignee of that plaintiff. Lord *Hardwicke* said, he would never grant such motion to stay proceedings, but where several bills are brought by the same person, and for the same thing; or in case of an infant, where several bills are brought by several *prochein amies*, for the same thing. If the bills proceed to a hearing, that which is improperly brought will be dismissed.

Amb. 103.

Three creditors, who were within the terms of a trust created by a will for the payment of debts, bring a bill to carry the trusts of the will into execution; the rest of the creditors brought a second bill for the same purpose, and obtained an order at the Rolls that both bills might be referred to a Master to certify, which would be most for the creditors benefit; but this order was afterwards discharged.

3 Atk. 602.

Two bills upon one subpœna.

[Two bills may be put in upon one subpœna, so that they be not for one and the same cause; and each must have a separate answer: but if it appears both of them are for the same cause, one of them will be dismissed with costs.]

[1 Prax. Am. 4.]

Plaintiff to give security for costs disused.

[By the 15th of *Hen.* 6. *c.* 4. a subpœna is not to be granted till the complainant hath given security to answer damages and costs; but this is fallen into disuse.]

[Hereto-

[Heretofore alſo the bill ſhould by right have been filed before ſuing out the ſubpœna; but latter uſage had made it time enough if the bill came in as follows:—If the ſubpœna was returnable upon a general return-day, as *craſtino*, *octabis*, *tres*, &c. after any of the great feaſts, the bill was to be in before noon of the ſixth day following; the return-day to be counted one of the ſix, which if it was not, the appearance being entered and coſts preferred, the fourth day poſt return, the defendant would be diſcharged attendance with coſts.] Bill uſed to be filed before ſubpœna iſſued.

[Where the ſubpœna was returnable on a day certain, as upon any one day of the month, the bill was to be filed the ſecond day after it, before noon; elſe (an appearance entered) coſts where preferred the third day, (which begins after dinner, the ſix clerks ſtriking the time they go to dinner, and from thence accounting the day to begin) and the defendant would be diſcharged with coſts, to be taxed by a Maſter.]—*Px.* 5. [Px. Alm. 5.]

[If a ſubpœna was returnable *immediatè*, the bill was to be filed the day after ſervice.] Bills not to be filed till ſubpœna was iſſued.

[But now, by the ſtatute 4 & 5 *Annæ reginæ pur amendment del ley*, no ſubpœna or other proceſs for appearance is to iſſue out of any court of equity till after the bill is filed with the proper officer in the reſpective courts of equity, (except in caſes of bills for injunctions to ſtay waſte, or ſuits at law commenced,) and a certificate thereof brought to the ſubpœna office, or to him who uſually makes out ſubpœnas, or other proceſs in the ſeveral courts of equity, under the hand of the ſix clerk, or other ſworn clerk, who uſually files bills in equity; for which certificate, he ſhall receive no fee.]

After a bill is drawn or peruſed and ſigned by counſel, it muſt be fairly engroſſed on parchment, with double one ſhilling ſtamps, and carried to a clerk in court to be filed, who firſt enters it in his cauſe book, and then in the general bill book of the office; after which he marks it at the top with the day of the month and year, and ſubſcribes his name at the bottom on the left ſide, and delivers it to his ſix clerk to be filed; if the ſix clerk be abſent, he puts it over his ſtudy door: and the ſix clerk, having entered it in his book, files it. How filed. Hind. 18.

[Bills

Not to be antedated. [Ord. Chan. 93.]

[Bills are not to be antedated; but all are to be dated the same day they are brought into the six clerks' office.]

[Ord. Chan. 94.]

[No under clerk shall keep a bill by him; but with the first opportunity deliver it to the six clerk, or his allowed deputy, to be filed.]

Bill filed in another's name.

[If a bill is exhibited in any persons name, without his privity, the Court (upon shewing it) will dismiss the bill; at least as to him, if there be more plaintiffs. To that purpose,]

Dismissed.

[He may either come into court and disclaim the suit, or give power in writing to a counsel to move, that it may be dismissed; and it will be dismissed with costs (as it is said) against the person who preferred the bill.]

[The warrant to the counsel, after it is read, is taken and kept by the Register.]

Bill on behalf of wife against husband.

[So, if a bill be exhibited in the wife's name against her husband; upon affidavit that she knew nothing of it, nor consented to it, it may by motion be dismissed.]

[Ord. Ch. 94. 46 55.]

[No bills, answers, or other pleadings, shall be said to be of record, or of any effect in court, till filed with the proper officer or six clerk. Nor are they to be copied till they are so filed.]

Records copied.

Records, how copied. Ord. Ch. 69.

[They shall not be copied or engrossed out of the office; and when done shall be presently brought back to the six clerk.—*The practice is otherwise.*]

Cross bill.

[A cross bill may be brought any time before hearing: before the defendant has appeared, the plaintiff may upon motion either amend or dismiss his bill without costs.]

Striking out defendant's name.

[So he may upon motion have leave to strike defendant's name out, *&c.*]

Costs to be taxed on dismissal of the bill. 2 Vern. 216.

[By the late act for amendment of the law, the plaintiff upon dismissing his own bill shall pay full costs, to be taxed by a Master: but it is, I suppose, to be understood, where the defendant has appeared and answered.]

Amendment after appearance.

[After appearance, the plaintiff may amend his bill without notice of the motion, or paying costs, if it is but in a small matter, and before the defendant has answered.]

[Where

[Where a cuſtom was laid wrong in the days, and the defendant anſwered and confeſſed the cuſtom, as the truth was: the Court gave leave to amend the bill without coſts. He amending the defendant's copy.] Amendment.

[If the amendment is in a material point, the clerk or ſolicitor on the other ſide muſt have notice of the amendment; and his copy muſt be amended accordingly.]

[If the amendment is ſo much, that the defendant will need a new copy, the party amending muſt pay 20s. coſts.] 20s. coſts.

[So, if the amendment require the defendant's further anſwer, the plaintiff muſt pay coſts.]

[If after appearance the plaintiff diſmiſs his bill, he muſt pay coſts as aforeſaid, by the ſtatute.] Coſts on diſmiſſion.

[After anſwer, the plaintiff may have leave to add parties, or amend his bill with reſpect to them, without coſts; and ſo he may ſometimes in other matters, if he agree to require no further anſwer of thoſe that have already anſwered, and that the defendant be at liberty to anſwer if he thinks fit. But the amendment muſt be ſo ſmall, that the defendant's copy may be conveniently altered as to the amendment (which the Court will order to be done); or elſe he muſt pay 20s. coſts; becauſe the defendant muſt take a new copy.] Without coſts. Amendment.

[If the amendments are ſmall, the old engroſſment may be amended: if not, there muſt be a new one, or a ſupplemental bill, whereto counſel's hand muſt be ſet.] *Vide Amended Bill.* New engroſſment.

[Adminiſtrator *durante minori ætate* brought a bill. The infant comes of age (17, I ſuppoſe); the ſuit does not abate; but praying relief to amend in the names, the Court gave leave without coſts.]—*Vide Infant; Guardian.* Infancy.

[After a plea or demurrer, if the plaintiff amend in the matter pleaded or demurred to, he muſt pay 20s. coſts.] Amendment after plea.

Bills receive ſeveral names from their ſeveral prayers, purpoſes, or ends.

The moſt general is

A BILL

A BILL AD SECTAM.

What.

[SEEING most bills are at the suit of such persons as have no remedy at common law, to enforce the defendant to do or forbear somewhat, which in equity and good conscience he ought: and by this appellation it should seem to stand most distinguished from a bill of revivor, or other bill, after the commencement of the suit by the original bill. But whereas a bill *ad sectam* sometimes prays an injunction to stay proceedings, *&c.* and sometimes a *certiorari* to remove the cause, *&c.* into this court; it often receives the particular denomination of injunction bill, *&c.* and if nothing but the common process be prayed before the decree, then the bill is called a bill *ad sectam.*]

This bill is an original bill, praying the decree of the Court touching rights claimed by the person exhibiting the bill, in opposition to rights claimed by the person against whom the bill is exhibited, and must shew the rights of the plaintiff, by whom, and in what manner he is injured; or in what he wants the assistance of the Court; and that he is without remedy, except in a court of equity, or at least is properly relievable or can be most effectually relieved there; and pray, that the defendant may answer upon oath the matters charged against him; and it may also pray assistance of the Court, which the plaintiff's case entitles him to: for these purposes the bill must pray, that a writ called a writ of subpœna may issue under the great seal, which is the seal of the Court, to require the defendant's appearance and answer to the bill; unless the defendant has privilege of peerage or as a lord of Parliament, or is made a defendant as an officer of the crown.

Mitf. Tr. 37.

Subpœna.

In the case of a peer or peeress or lord of Parliament, the bill must first pray the letter of the person holding the great seal, called a letter missive, requesting the defendant to appear to and answer the bill;

Mitf. Tr. 38.

Letter missive.

bill; and the writ of subpœna only in default of compliance with that request.

If the Attorney-General is made a defendant as an officer of the crown, the bill must pray, instead of a writ of subpœna, that he, being attended with a copy, may appear and put in his answer. Mitf. 38.

It is usual to add to the prayer of the bill a general prayer of that relief which the case may require; that if the plaintiff mistakes the relief to which he is entitled, the Court may yet afford him that relief to which he has a right. Indeed it has been said, that a prayer of general relief, without a special prayer for the particular relief to which the plaintiff thinks himself entitled, is sufficient; and that the particular relief which the case requires may, at the hearing, be prayed at the bar; but this relief must be agreeable to the case made by the bill, and not different from it: and the Court will not in all cases be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced. If therefore the plaintiff doubts his title to the relief he wishes to pray, the bill may be framed with a double aspect; that if the Court determines against him in one view of the case, it may yet afford him assistance in another.

Prayer. 2 Mod. 91, 92. 2 Atk. 3. 2 Atk. 141. 3 Atk. 132. and Birch v. Corbin, 9 Dec. 1784. 2 Atk. 325.

It is the practice to insert in a bill a general charge, that the parties named in it combine together, and with several other persons unknown to the plaintiff, whose names when discovered the plaintiff prays he may be at liberty to insert in the bill. The practice is said to have arisen from an idea, that without such a charge parties could not be added to the bill by amendment; and in some cases, perhaps, the charge has been inserted with a view to give the Court jurisdiction. From whatever cause the practice has arisen it is still adhered to, except in the case of a peer, who was never charged with combining with others to deprive the plaintiff of his right, either from respect to the peerage, or perhaps from apprehension, that such a charge might be construed a breach of privilege.

Charge of combination. Mitf. 40.

The charge of combination is often omitted in amicable suits.

The

How drawn.

The rights of the ſeveral parties, the injury complained of, and every other neceſſary circumſtance, as time, place, or other incidents, ought to be plainly, yet ſuccinctly alleged. Whatever is eſſential to the rights of the plaintiff, and is neceſſarily within his knowledge, ought to be alleged *poſitively* and with preciſion, and not averred that he was ſo informed: but the claims of the defendant may be ſtated in general terms; and if a matter eſſential to the determination of the plaintiff's claims is charged to reſt in the knowledge of the defendant, or muſt of neceſſity be within his knowledge, and conſequently the ſubject of a part of the diſcovery ſought by the bill, a preciſe allegation is not required.

Mitf. 40.

1 Ves. 56.

1 Roll. Abr. 374.

In what caſes.

Bills may be filed for relief in equity in all caſes of truſt, fraud, or accident.

2 P. Will. 154.

A bill in equity lies to recover back money paid on a bubble.

3 P. Will. 187.

So to compel a ſpecific performance of an award to convey an eſtate, where the party ſubmitting has received the money, in conſideration whereof he is to convey the eſtate ſued for.

3 P. Will. 390.

Bill lies to compel the delivery of an altar-piece, or other curioſity in ſpecie, and undeſaced.

2 Atk. 324.

Bill lies by the heir at law to ſet aſide a conveyance procured from the anceſtor by the fraud, impoſition, and undue influence of the defendant.

2 Ves. 426.

Bill lies in the name of a chaplain or curate to eſtabliſh his right: but not an information in the name of the Attorney-General, unleſs for charities as augmentations of vicarages are.

Amb. 236.

Bill lies for a partition; it is a matter of right; and there is no inſtance of not ſucceeding in it, but where there is not proof of title in the plaintiff.

Amb. 273.

Bill for ſecurity of a legacy, which the defendant, the executor, was to pay at the end of ten years from the death of the teſtator; and though no particular reaſons were aſſigned, as waſting aſſets or inſolvency in defendant, yet decreed on the general rule of the court, by Sir *Thomas Clarke*.

Bill, filed by the Biſhop as ordinary againſt the defendant, the patron, and the clerk preſented by him, to be inſtituted to the living of *Woodham Walter* in *Eſſex*,

Essex, to discover whether the clerk so presented had not given a general bond of resignation, in order to set up that bond as a defence at law, for having refused institution; and a demurrer to the bill was overruled. 1 Bro. 96.

Agreement to sell an estate for 200*l.* and an annuity of 50*l.* to the vendor for his life, the vendor died two days after the contract, and the bill lay for a specific performance of an agreement against the heirs at law, although the vendor died before any payment of the annuity had taken place. 1 Bro. 156.

Bill in equity does not lie against a tenant for satisfaction for waste done in cutting timber, without praying an injunction to stay waste. Nor will it lie for an account and satisfaction for stones picked and carried off the land. Amb. 54.

A bill will not lie to have satisfaction for a judgment obtained at law, out of stock standing in the name of trustees, after a *ca. sa.* had been taken out, and the defendant taken in execution. Amb. 79.

Bill will not lie to rectify a mistake in a common recovery, especially after a length of time and against a purchaser. Amb. 101.

Bill will not lie by the executor of an attorney, to be paid his bill for business. Amb. 109.

Bill will not lie to have an issue to ascertain boundaries between two parishes. 1 Bro. 40.

Bill will not lie to compel an hospital to renew a lease upon terms: *viz.* upon a fine under two years reserved rent. 1 Bro. 61.

Bill will not lie against several tenants of a manor for quit-rents. 1 Bro. 200.

For more on this subject, vide *Treatise on Equity, by Mr.* Fonblanque.

AMENDED BILL.

What. Mit. 53.

AN imperfection in the frame of a bill may generally be remedied by amendment; every amendment is in fact a continuation of the original bill, and is considered as forming part thereof, for both the original and amended bills constitute but one record.

Hind. 21.

New engrossment.

When the new matter is but small, and does not exceed in any one place two folios, the record is amended by interlining, provided the same be done so as to make the record fair and legible; or if the amendment be by omitting original matter, it is done by striking through the same with a pen. If the amendment be too copious for interlineation in the original record, then the bill is new engrossed and annexed to the original bill.

Hind. 22.

Before appearance.

If the amendment be made before appearance, it is done without costs; so after appearance and before answer, or after answer, and no further answer be required. It is also done without costs, amending defendant's office copy; but if a further answer be required, or if the bill be newly engrossed, then the plaintiff pays 20s. costs to the clerk in court, for each defendant, or set of defendants; or in case the clerk in court be employed by two or more solicitors, then to such clerk in court 20s. for each defendant, or set of defendants, employing a different solicitor. And if a further answer be required, then a subpœna to appear and answer must be served; and in default, the ordinary process of contempt may be issued.

Hind. 22.

1 Vez. jun. 250. contrà.

After replication. Hind. 22.

The plaintiff may also amend his bill after replication, upon obtaining an order to withdraw his replication and amend his bill, which is always done upon payment of the like costs; and in every case where it is done upon payment of costs, they must be first paid, or the proceedings are nugatory.

How order to amend obtained.

In all these cases the orders are obtained by motion, or by petition of course, to the Master of the Rolls; and a copy of the order must be served upon the adverse clerk in court before plaintiff can proceed, and the order itself must be left with the plaintiff's clerk in court.

Hind. 22.

Examination. Mitf. Treat. 53.

After examination of witnesses, the bill cannot be amended, except by adding parties. *Hind.* 25.

If

If the defendant anſwers insufficiently, and exceptions are taken to ſuch anſwer, and it be referred to a Maſter, who, upon arguing the exceptions before him, reports the anſwer insufficient; in this caſe the bill may be amended by order obtained by motion, or petition without coſts; ſuggeſting that the anſwer is reported insufficient, and praying that the defendant may anſwer the exceptions and amendments at the ſame time; and when exceptions are taken to any anſwer, and defendant ſubmits to put in a better anſwer, and it is neceſſary to amend the bill, it may be done without coſts. Exceptions. Hind 23.

When plaintiff hath obtained an order to amend *after anſwer*, and neglects ſo to do, defendant may after three terms move to diſcharge the order, and at the ſame time move to diſmiſs the bill, in the uſual manner; or if an injunction hath been obtained for default of appearance or anſwer, and plaintiff amend his bill upon coming in of the anſwer, defendant muſt after anſwer to the amendments move to diſſolve the injunction *niſi*, for the injunction is not diſſolved by plaintiff's amending his bill, or by defendant's anſwering thereto; and if after anſwer, and before the injunction be diſſolved, defendant incur a breach thereof, he may be committed. *Maſon* v. *Mooray*, *per* Lord *Bathurſt*. If plaintiff does not amend, order may lie discharged. Hind. 23.

When plaintiff hath obtained an order to amend his bill and neglects to act under it, defendant may move that plaintiff may amend his bill in a limited time, or the order to amend be diſſolved. The plaintiff ſometimes excepts to the defendant's anſwer, and then moves to amend, and that the defendant may anſwer the exceptions and amendments at the ſame time, and frequently to keep an injunction in force; or otherwiſe plaintiff does not amend in a reaſonable time, in this caſe defendant may move, that plaintiff be ordered to amend in a certain time, or that the order to amend be diſcharged, and defendant be at liberty to anſwer the original bill. Amendment before anſwer. Hind. 23.

Before anſwer, a defendant may be ſtruck out of the bill at plaintiff's requeſt, or if defendant has anſwered or diſclaimed, or appears diſintereſted, ſuch defendant may be ſtruck out at any time before hearing: but after appearance and anſwer, it muſt be with coſts, the bill as to him being diſmiſſed. Defendant ſtruck out of the bill before anſwer without coſts. Hind. 24.

By the courſe of the court, the plaintiff in a croſs cauſe cannot have an anſwer till he has himſelf anſwered Croſs-cauſe.

the original bill; but this is a privilege the plaintiff in the original bill has in right of his original bill; for if after the crofs bill be filed, he will amend the original bill in material parts, he will not be entitled to have an anfwer to the amendments; for as the bill may be amended both in difcovery and relief, the pendency of the fuit, as to thofe parts which are amendments, is only from the time of the amendment.

2 Atk. 218.

Decree pro confeffo. 2 Atk 25.

Lord *Hardwicke* was inclined to think ,that where there is an amended bill and no anfwer to it, the plaintiff is entitled to a decree *pro confeffo*, abftracted from any proceedings in the original caufe.

Supplemental bill.

An original bill was brought by a creditor againft Mrs. *Higden*, as adminiftratrix of *A.* who being a married woman, her hufband was alfo made a party; before hearing, the wife dies; the hufband took out adminiftration *de bonis non*, &c. of *A.* upon which the plaintiff amended his bill againft the hufband, to which amendment the defendant demurred, *for any matter, which arifes fubfequent to the original bill, cannot be put in o the amended bill*; but a bill of revivor and fupplement ought to be brought. Demurrer allowed: for it is a conftant rule, that matter fubfequent to the original bill muft come by way of fupplemental bill and revivor.

1 Atk. 291.

The bill charged, by way of amendment, matters which arofe after filing the bill; *viz.* that plaintiff had taken out letters of adminiftration; and although it was pleaded that this matter was proper in a fupplemental bill, yet the plea was over-ruled, for that fuch matters may be charged either by way of fupplement or amended bill.

3 P. W. 351.

Parties.

After publication, and any time before hearing, the court will, upon caufe fhewn, fuffer the bill to be amended by adding parties; and if parties be added after publication, the caufe, as to fuch parties, muft be heard upon bill and anfwer only.

Hind. 25.

Publication. 1 Atk. 51.

After publication is paft, there is no inftance of a plaintiff obtaining an order to amend his bill without withdrawing his replication.

Demurrer. Coffs. Mof. 301.

A plaintiff may amend his bill upon payment of 20*s.* coffs, after a demurrer is put in, if it be not fet down to be argued, and after it is fet down on payment of the coffs of the demurrer.

Publication. Parties.

After publication has paffed and the caufe fet down the bill may be amended in no other refpect than by making

making parties, and no new charge can be introduced or a material fact put in issue, which was not so in the cause before, but a supplemental bill should be preferred. 3 Atk. 370.

After defendant hath answered, if plaintiff amend his bill, and require no answer from the defendant, amending defendant's office copy, the defendant has eight days exclusive, after the record is amended and delivered over, to answer the amendments, and plaintiff cannot reply to defendant's answer, till the eight days are elapsed. Answer. Hind. 25.

A plaintiff by a false suggestion *that the cause was at issue only*, when it was in the Lord Chancellor's paper for hearing, obtained an order by petition at the Rolls for liberty to amend his bill, by inserting the prayer of the original bill, which had been omitted by negligence in the amended bill: the order at the opening of the case was discharged as irregularly obtained, with 20s. costs, and the cause put off till next term, that upon paying the costs of the day, the plaintiff might have an opportunity of amending his bill. Irregularity. 3 Atk. 583.

No precedent in this court of an amendment to a bill in part, wherein it has been dismissed upon its merits. Not to be amended after dismissal. 2 P. W. 402.

After a dumurrer to the whole bill allowed, the bill is regularly out of court, and no instance of leave to amend it, though before the arguing the demurrer the plaintiff might have amended. Demurrer. 2 P. W. 300. in notis.

The plaintiff amends his bill several times, yet he shall not pay taxed costs, but 40s. only; there must be a general rule upon the subject, and that general rule allows but 40s. costs, and must be abided by. 2 *Atk.* 123. *contrà.* Costs. 2 Bro. 291.

Bill amended after answer, for which the plaintiff must pay costs; the amended bill is then considered as the original bill; and the defendant gets rid of the submissions in the answer, which do not bind him after the amendment of the bill. Neither party can bind the other. Plaintiff is not bound by offers in the original bill, nor defendant by submission in his answer. Amendment after answer. 1 Vez. jun. 210.

On amended bill, it is not necessary to serve new subpœnas upon the original defendants. Subpœna. 1 Vez. jun. 250.

Motion of course to amend the bill upon payment of 20s costs after plea or demurrer put in, must state that the plea or demurrer is not set down. Demurrer. 1 Vez. jun. 448.

Replication.

In the Exchequer, on motion to withdraw the replication and amend the bill, it is not enough to shew the materiality of the amendments, but the plaintiff ought also to shew why the matter to be introduced by amendment, was not stated before.

3 Anstruther, 807.

Answer.

Where the bill was amended after answer, by adding a defendant, the original defendant cannot answer the amended bill, nor have an order for time to answer.

3 Anstruther, 879.

BILL TO PERPETUATE TESTIMONY OF WITNESSES.

VIDE

Examination.

Title.

[THE bill must shew a title to the thing whereto the testimony relates; and that the witnesses are old, infirm, or sick, not likely to live long, or that they are going to sea, or beyond seas, whereby the party is in danger of losing their testimony, *&c.* and then pray to examine them, (and if necessary, a commission to that purpose,) and a *subpœna* to the parties interested, to shew cause if they can, to the contrary.]

[C. A. 434. Px. 43.]

Examination de bene esse.

[After the bill is filed, the Court, on affidavit that the witnesses are going beyond sea, will order them to be examined *de bene esse*]

So if they live in the country, and the party is in danger of losing their testimony, the Court will upon motion, or petition, and affidavit, grant a commission: or if they reside within 20 miles of *London*, will order them to be examined by the examiner *de bene esse*, which will make their depositions valid in that case only, and against those, who are parties to the bill; but if it appear that they might afterwards have been examined in chief regularly, such depositions shall not be made use of, and if the witnesses live till they can be examined in chief, they must be examined in chief; but if they die in the mean time, or have not returned from beyond sea before the hearing, then their depositions may be published. The depositions thus taken will bind as well as the parties, as all claiming by, through, or under them.

Hind. 32.

[Touching

[Touching the examination of witnesses *in perpetuam rei memoriam*, the following orders were made by my Lord *Bacon*, in the 3d of *Eliz*:]

[First, the commissioners shall examine no witnesses, but such as are aged and impotent.] Lord Bacon's Orders.

[*Item*, that the complainant or party, who sueth forth the commission, shall give warning by precept from the commissioners, unto the party that should take prejudice by this examination, by the space of 14 days at the least, of the time and place when and where the said commissioners will sit upon this commission.]

[And the same warning being so given, the commissioners are to be satisfied by the oath of the party complainant, or some other credible person, that warning is given accordingly, before they shall proceed to the execution of the commission.]

[If the party adversant or defendant can shew before the commissioners good cause of exception, either against the witnesses produced by the complainant, or any of them, or against the commissioners themselves, or otherwise, then they shall cease and forbear any further execution of the commission.]

[And the commissioners shall certify and return the said causes and exceptions up with the commission.]

[If the party adversant cannot shew sufficient cause (as aforesaid), then the commissioners shall proceed to the examination of witnesses, and the party, adversant or defendant, shall have liberty to join in the examination of the same witnesses, or of any other likewise upon interrogatories on his behalf, if he think good.]

[The commissioners shall certify in their return of the commission, such exceptions as the defendant shall take against the proceeding in the same commission, and whether the defendant did appear or not.]

[And if the defendant did not appear, they are likewise to certify and return, whether affidavit were made of the giving of warning by precept (as aforesaid) or no.]

[This order is to be observed, in case where the commission is, *ex parte querentis* only; and it is to be engrossed in parchment, and to be subscribed with the

hand of the register, and to be annexed to every of the said commissions, but not otherwise.]

[For if the defendant join, then these articles shall not need.]

[*Item*, that the commissioners names be specially assigned by the Lord Keeper, or Lord Chancellor, *pro tempore*.] The subpœna *in perpetuam rei memoriam* being disused, the above orders of Lord *Bacon* are obsolete.

Hind. 368.

Lord Bacon's Rules. Publication.

[And these further rules, touching publication, were also made by him.]

[The party who prayeth publication, shall first, by himself or some other, make oath, that the depositions of the same witnesses are necessary to be given in evidence on his behalf.]

[Oath also must be made, that the same witnesses be either dead, or so aged or impotent, as they cannot travel or testify (*vivâ voce*) without danger of life.]

[This oath being so taken, a Master of the Chancery must first open the commission, and consider whether this order before mentioned hath been observed in all points; wherein he being satisfied, publication is thereupon to be granted.]

[Provided always, that no depositions shall be given in evidence, but against the persons that were by precept warned (as aforesaid), or against their heirs or assigns.]

[And provided also, that after examination had and taken (as aforesaid), and after publication had and granted of the same examination, the party, adversant or defendant, shall not be admitted to have any new examination on his behalf concerning the same matter.]

[Toth. 24. &c.] [And it was further ordered, that a joint commission should be made, as all other general commissions, to examine witnesses, *super interrogatoribus administrand.* are, adding at the end of the same these words, *in perpetuam rei memoriam permansur.*]

[But the course has been since said to be, that if the party interested, within 14 days after service of the subpœna, shew cause to the contrary, allowed by the Court, then the plaintiff is to desist; if not, he may go on alone and examine them *ex parte*: or the defendant may come in by appearance and join the commission, (if he pleases,) and then 14 days notice is to be given of executing the commission.]

[Px. Alm. 22.]

[If

[If the defendant will not join in commiſſion, *ſaid*, the plaintiff's clerk muſt preſer ſix commiſſioners names in court, to the Lord Keeper; whereof three or four of them, or others, which the Court ſhall appoint, ſhall be commiſſioners to examine according to the ancient rules of the Court. But this is not now practiſed.] Joining in commiſſion. [3 Pr. Alm. 60]

[Upon a ſubpœna in perpetual memory, the defendant appearing aſſented to join in commiſſion, ſo as the Lord Keeper *Bacon*'s orders touching the examination of witneſſes in perpetual memory might be obſerved. But upon motion, it was ordered, the commiſſion ſhould be made general, as in like caſes where the parties join; for that it ſeemed to the Court, the Lord *Bacon*'s orders were intended to be obſerved only where the plaintiff hath a commiſſion alone.] [Ca. Rep. 122.]

[Said, the court does not now give articles to examine upon, but the parties exhibit what interrogatories they think neceſſary; and the proceedings upon this bill are moſtly the ſame as in other caſes.] Interrogatories.

[Theſe bills to examine *in perpetuam rei memoriam*, were utterly diſliked by the Lord Chancellor *Eggerton*; becauſe the depoſitions are not (ordinarily) to be publiſhed, but upon oath, that the witneſſes are dead; and being dead, there is no remedy againſt them if they have committed perjury. And he ordered the party to exhibit his bill upon the title, and ſo to proceed to an examination and publication in ordinary courſe; ſaying, they might go to law if they would, and take the benefit of thoſe examinations.] [Pra. H. Cha. 8, 9. Toth. 18.]

[Though the depoſitions are not ordinarily to be publiſhed whilſt the witneſſes live, yet in ſome caſes, as by conſent of parties, or upon oath that the plaintiff has ſome trial at law, wherein he ſhall need them, and that the witneſſes are not able to travel, or for other good reaſon, the Court will ſometimes order publication in the life of the witneſs, and then the commiſſion is to be opened by the Maſter, to be conſidered of according to the Lord Keeper *Bacon*'s order; and afterwards the party may exemplify the depoſitions, and they may be given in evidence in any other court, by order of this Court.] Depoſitions. [Com. Att. 43.]

[If a matter be properly triable at law, as a title, and the plaintiff can have an opportunity to try it there, this bill is not to be brought here till the party has af- Matter to be firſt tried at law.

firmed

firmed his title at law; if he does, it will be dismissed upon a demurrer.]

[A bill set forth, that one of the defendant's ancestors settled the estate in question on the plaintiff in tail, that the deed was lost, or in the defendant's hands, and prayed that the plaintiff might examine witnesses *in perpetuam rei memoriam.*]

[The defendant answered the whole bill, and (as I suppose) denied his having the deed; but as to the examining witnesses *in perpetuam*, &c. or proceeding any further, the defendant demurred; for that the plaintiff might try his pretended title at law; and seeing there was no impediment at law, but that the plaintiff might try his title there, and affirm it and this deed, by which he claimed; and because he had not so done, the demurrer was upon great debate allowed.] [Ch. Int. 26.]

Examination.

[The examiner may proceed to examine witnesses in perpetual memory, if the plaintiff hath served the defendant with a subpœna, to give him notice to examine likewise.] [Ca. Rep. 48.]

Depositions. Evidence.

[According to the aforesaid orders, the depositions are not to be given in evidence, or made use of against any others but the defendants, who were *subpœnaed* to defend the matter, or some claiming under them some interest accrued since the bill preferred.] [Px. Alm. 3.]

To prove will against heir. Stiles' P. Register, 587.]

[Where lands are devised by will, and there is no occasion or opportunity to prove and establish it at law, it is often thought necessary to perpetuate the testimony thereto in this court.]

[The way to do which, is to exhibit the bill against the heir at law, and thereby set forth the will in *hæc verba.*]

[The defendant having answered, they must proceed to issue as in other cases, and then examine the witness to the will, or prove their hands if they be dead.] [Px. Alm 44.]

[The will must be put into the examiner's office, to be examined to; which done and publication past, the cause is at an end.] [Ibid.]

Issue directed upon a will.

[Said, though this Court suffers examinations to perpetuate testimony of a will, yet it will not barely try the validity of a will; but if the same come collaterally in question upon a bill for the performance of a trust, or touching a devise out of lands, *&c.* the Court will sometimes direct an issue at law, to try the validity thereof.]

[Though

[Though there be goods or chattels devised by the same will, whereby lands are devised, yet the proving thereof in the spiritual court is of no avail in respect of the lands. And this court (as a court of law) will prohibit the spiritual court to meddle in the proof, any further than concerns the goods, *&c.*]

[An issue having been by this Court directed to try whether a pretended will or testament of goods only was a will or no will, and it being thereupon found no will, the Court granted a perpetual injunction to the defendant not to prove such pretended will in the ecclesiastical court.] [1 Ch. Ca. 80]

[The Court suffered a widow to revive a bill to perpetuate the testimony of witnesses to a will, saving the advantage of exception at the hearing. Though upon a former bill by her husband, and issues at law thereon, the testator was found *non compos mentis*, and the finding upon the said issues, *&c.* was insisted on in the answer, by way of bar to the present bill of revivor.] Revivor.

A bill was exbibited to examine witnesses *in perpetuam rei memoriam*, to prove *a modus decimandi*. Demurrer, for that the bill was to establish a custom against the church, and in prejudice of tithes, which are due *communi jure*, and this bill being only to preserve testimony, the demurrer was over-ruled. To preserve testimony of a modus. 1 Vern. 185.

Bill by defendant at law to examine witnesses to prove a right of common *in perpetuam rei memoriam*. But the Court was of opinion, that a commoner ought not to come here to prove his right of common, till he had recovered at law in affirmance of his right. Of a right of common. 1 Vern. 308.

Bill to preserve the testimony of witnesses, touching the title of certain lands in the bill mentioned. The defendant demurred, because there was no impediment to hinder the plaintiff from trying his right at law, and that he had not obtained any verdict in affirmation of his pretended title. Demurrer allowed. Of title to lands. 1 Vern. 441.

In a bill to perpetuate the testimony of witnesses, touching a right of way, the bill must set out the way exactly, *per et trans*, in the same manner as it ought to be set out in a declaration at law. But such bill ought not to be brought for such trivial things as rights of common, or for ways or watercourses, till after a recovery at law. However, in this case the bill charged that the plaintiff's tenant was in combination with the defendant, Of right of way. 1 Vern. 318.

defendant, and would not suffer the plaintiff to bring an action in his name.

Lunatic's will. 1 Vern. 105.

A bill will not lie to perpetuate the testimony of witnesses to a lunatic's will in his lifetime, which will was made before his lunacy.

Purchaser.

Bill to prove a will and perpetuate the testimony of witnesses. Defendant pleaded himself to be a purchaser for a valuable consideration without notice, and insisted, that unless there had been a verdict in affirmance of such will, the plaintiff ought not to be permitted to examine his witnesses. Plea allowed.

3 Vern. 354.

Sole right of fishery.

Bill to perpetuate the testimony of witnesses *to establish plaintiff's sole right of fishery*, suggesting that *the defendant pretended a sole right of* fishery, and threatened to bring actions *and disturb him when all his witnesses should be dead.* Demurrer; for that the plaintiff had not verified his title at law, and therefore had no right to bring his bill in the first instance. Demurrer overruled. And this difference was taken by the Court—that if one *out of possession* brings such a bill, a demurrer will be good, because he ought first to establish his right at law.

Prec. Cha. 531.

When only one witness. 3 P. Wil. 77.

Witness ordered to be examined *de bene esse*, where the thing examined to lay only in his knowledge, and was of consequence, though the witness was not proved to be old or infirm.

Waste. 1 Atk. 450.

A man may bring a bill to perpetuate testimony, where he cannot bring a bill for relief without waiving the penalty as in waste, *&c.*

Usurious contract. 1 Atk. 450.

Plaintiff may file a bill to perpetuate testimony on an usurious contract, though he does not offer to pay what is really due.

Tenant in tail. 1 Atk. 571.

Tenant in tail out of possession cannot bring a bill to perpetuate testimony till he has recovered possession by ejectment.

Costs. 2 Atk. 167.

Where plaintiff on a bill to perpetuate testimony of witnesses has examined, and thereby had the fruit of his bill, neither party is entitled to costs.

Praying relief dismissed. 2 Vent. 366. 3 Atk. 439. 3 Anstruther, 768. contrà.

Bill for discovery and perpetuating testimony, plaintiff struck out the discovery and all the relief; but, in praying process, prays, that the defendant may abide such *order* and decree as the Court shall think proper, it makes a bill for relief, and ought to be dismissed.

Costs. 1 Atk. 610.

In a bill to perpetuate testimony of witnesses, costs are never given against the defendant.

On a bill to discover a title to land, and to perpetuate testimony, *&c.* Defendant answered as to the title, and demurred as to perpetuating the evidence, in regard the defendant might bring his ejectment and, examine his witnesses at the trial, and upon affidavit, that the plaintiff's witnesses were infirm and unable to travel, the demurrer was over-ruled by the Master of the Rolls, and afterwards by the Chancellor, Lord *Cowper*; on a rehearing, but without such affidavit, the demurrer had been good. Witnesses infirm, &c. 1 P. W. 117.

A witness ordered to be examined *de bene esse*, no other person being privy to the thing examined to, which was a matter of great importance, though the witness was not proved to be old or infirm. Sole Witness. 3 P. W. 78. 2 Bro 641. 4 Bro. 157.

Motion to examine a surviving witness to a will *de bene esse*, upon affidavit, that the parties concerned lived in *Virginia*, and that the surviving witness was upwards of 60 years old, and greatly afflicted with the gravel. Lord *Hardwicke* said, that the affidavit was not quite full, that the witness should be 70 years old, but as the parties lived in *Virginia*, he granted the motion. Witness abroad. Amb. 65.

Bill to perpetuate testimony respecting a right of common and way, the plaintiffs claimed as lessees of a manor under the Bishop of *Winchester*; and the bill charged, that the tenants, owners, and occupiers of the said lands, messuages, tenements, and hereditaments in right thereof *or otherwise*, have had from the time, whereof the memory of man is not to the contrary, have, and of right ought to have common of pasture for their horses, sheep, and other cattle, in a certain waste called, *&c.* The Lord Chancellor thought that the defendant ought to know to what the plaintiff meant to point his commission; that the charges in the bill were too general, and not sufficiently descriptive of any particular right, and therefore allowed the demurrer, which had been put into the bill. Title clearly stated. 1 Ves. jun. 449.

BILL OF INTERPLEADER.

What.

[INTERPLEADER is, where two or more claiming the ſame thing by different or ſeparate intereſts, pray the judgment of the Court to which of them it belongs.]

[But that, which is commonly called a bill of interpleader, is a bill exhibited by a third perſon, who not knowing to whom he ought of right to render a debt or duty, fears he may be hurt by ſome of the claimants; and therefore prays they may interplead, ſo that the Court may adjudge to whom the thing belongs, and he be made ſafe.]

And this he may do whether any ſuits be actually commenced againſt him in law or equity, or if he is only in danger of being moleſted; as where different perſons claim the ſame thing in different and ſeparate rights.

Hind. 26.

A claim is a ground of interpleader.

2 Vez. jun. 107.

What.

[Sometimes interpleader happens where one, who is not party in the firſt ſuit, ſuppoſes he has a ſeparate intereſt in the matter in queſtion, and commences his ſuit againſt the firſt defendant, praying to be relieved according to his right; whereupon the firſt plaintiff makes the ſecond a defendant, in order to interplead and conteſt the right; or, if the firſt plaintiff does not make him a defendant, then if the defendant exhibit his bill, as he may do againſt both plaintiffs, and pray they may interplead and try to which the thing in demand belongs, and further, as his caſe requires: or, if there be no ſuit here between the pretenders, he who has ſuits at law brought againſt him, or is in danger of trouble from both the claimants, may file his bill againſt them, and pray that they may interplead, and that proceedings at law againſt him may ſtay till the right be determined.]

Affidavit.
Money in court.

[The plaintiff in a bill of interpleader muſt annex to his bill, or upon filing thereof make an affidavit, *(the former of which is now the practice,)* that there is no colluſion between him and any of the parties; and muſt alſo bring the money into court; till which done, the Court will not *commonly* order an injunction, or

3 Bro. 36.

ſhew

ſhew the plaintiff any countenance.] *Sed vide* 3 *Bro.* 36. where an offer to bring the money in was enough.

The affidavit to a bill of interpleader need not ſwear it is at plaintiff's own expence, but only that there is no colluſion with any of the defendants. Affidavit. 1 Vez. 248.

[A mortgagor brings his bill to redeem: after, come aſſignees of the mortgagee, with a bill of interpleader; the mortgagor then makes them defendants to his bill: they ſay, they are ready to receive the money. By the interpleader and delay of proceedings thereupon, the mortgagor keeps the money by him two years: he prays he may now pay it into court, to ſave further intereſt; which the Court would not order, but gave leave to the mortgagor to ſet down the cauſe for hearing againſt all on bill and anſwer.] Mortgagor.

If a cauſe has been heard upon a bill of interpleader, and a trial at law directed to ſettle the right between the defendants, there is an end of the ſuit as to the plaintiff; ſo that, if he afterwards die, the cauſe ſhall proceed, and there needs no revivor, each defendant being in the nature of a plaintiff. After hearing defendants proceed. 1 Vern. 351.

Bill founded on a rumour, that there was iſſue by Lady *Hanmer*, which iſſue was ſuggeſted to be entitled to the eſtate in queſtion; and praying, that if there were any ſuch perſon, he might interplead with defendant, and praying an injunction againſt an ejectment by defendant, and to any action for meſne profits. *Per Cur.*—The bill ought to ſtate ſome perſon capable of interpleading; it muſt ſhew that there is ſuch a perſon *in rerum natura* as can interplead, or it is bad. Who may interplead. 1 Vez. 248.

If a guardian ſets up a title to himſelf, and conceals an infant, who is ſuggeſted to have a right to controvert that title, a bill will lie to compel the guardian to produce him. Ibid.

A bill of interpleader cannot pray an injunction to reſtrain proceedings in ejectment, becauſe ſuch bill cannot be as to the poſſeſſion, but muſt be as to the payment of ſome demand in money. *Vide* 2 *Anſtruther*, 531. note. Not to ſtay ejectment. Ibid. 2 Vez. jun. 310. 2 Anſt. 529. 3 Anſt. 798.

An executor as he is *in auter droit*, unleſs he has proved his teſtator's will, is not entitled to bring a bill of interpleader, till, as ſtanding in the place of the Executor.

teſtator

testator by virtue of the probate, he has made himself a debtor. At law an executor may bring an action before probate, but he cannot declare till the will is proved; and a bill in equity being in the nature of a declaration at law, an executor cannot bring a bill till after probate.

3 Atk. 606.

Affidavit. Bunb. 303.

To a bill of interpleader against the Attorney-General and others, there must be an affidavit annexed.

Costs.

Bill of interpleader by lessees of Lord *Inchiquin* against several sets of annuitants, who had distrained for rent on plaintiff's farms; the rents accrued were paid into court; the plaintiff's costs were paid out of the rents in court.

2 Bro. 149.

Costs. 1 Vez. jun. 368.

Upon a bill of interpleader, no costs between the defendants.

Injunction affidavit. 2 Vez. jun. 102.

In support of a motion for injunction on a bill of interpleader, affidavits of the facts may be read; for it is on the same footing as waste.

Counter affidavit. 2 Vez. jun. 102.

Collusion not to be presumed against the affidavit of the plaintiff in a bill of interpleader; nor can a counter-affidavit be read against it.

Tenant and landlord. 2 Vez. jun. 304.

Interpleader will not lie by tenant against his landlord, on notice of an ejectment by a stranger, under a title adverse to that of the landlord.

To support such a bill, two persons must claim the same rent in privity of tenure and contract; as in the case of mortgagor and mortgagee, trustee and *cestui que trust*, &c.

2 Vez. jun. 312.

In the above case upon a report of collusion, the plaintiff and his solicitor were ordered to pay costs, and the solicitor to shew cause why he should not be struck off the roll.

How drawn. 2 Vez. jun. 311.

A bill of interpleader should not state a case.

For 10l. 2 Anst. 530.

Bill of interpleader for a sum under 10*l.* dismissed, being beneath the dignity of the Court. In Exchequer.

Bill praying, that a modus of 7*l.* might be established, and that the rector of *Market Bosworth*, and the rector of *Sibson* might interplead as to the tithes to be covered by the modus, dismissed.

3 Anst. 801.

AN INJUNCTION BILL

(*Vide Injunction*)

[IS to procure an injunction to ſtay proceedings at law, and to be relieved here; the complainant ſuggeſting a rigorous proceeding at law begun or threatened, and that either by the ſtrict rules of common law, or for want of his witneſſes, or other cauſe, he is without defence or redreſs there.] What.

[Or it is to ſtay waſte] or damage to freehold by felling timber, pulling down buildings, &c.

To yield up, quiet, or continue poſſeſſion of lands. Hind. 584.

To quiet poſſeſſion before hearing.

Againſt continuing nuiſances.

To prevent multiplicity of ſuits.

In ejectment cauſes.

To ſtay buildings.

On patents.

To reſtrain the ſale of a place.

To prevent uſing an old road.

From copying, engraving, &c. Barnard. 211.

From ſelling prints.

To injoin the printing or vending. 2 Atk. 142.

Printed copies of books.

To reſtrain publication of private letters. Amb. 737.

[Said, if a ſubpœna returnable immediately iſſue in an injunction cauſe, the bill muſt be filed by the firſt coſts-day,] *which is the next day after the return of the ſubpœna*, [in the ſubſequent term.] Bill, when filed.

[The lord of the manor brings ejectment againſt his cuſtomary tenants upon pretence of forfeiture; Contempt.

They exhibit a bill here to cauſe him to ſhew what breaches he intends to inſiſt upon at the trial; and upon his being in contempt the Court granted an injunction.]

Bill to be relieved againſt a negotiable promiſſory note given on a marriage-brokage agreement; on motion, the defendant was reſtrained from parting with or aſſigning the note till anſwer or further order. Negotiable note. Amb. 66.

General relief.

Bill for an account and general relief; defendant answered and brought an action at law; the prayer for general relief not sufficient ground for an injunction; that writ cannot be granted, but upon a special prayer in the bill for it.

Amb. 70.

Termor.
Amb. 105.

Plaintiff being a termor at ground rent, brought a bill against his lessee to stay waste, and moved at the Rolls for an injunction; but it was now moved again before the Chancellor and granted.

Hospital.
Amb. 158.

Injunction refused to stay building the Inoculation Hospital in *Cold-bath Fields*.

Landlord and tenant.
Amb. 619.

Lessee of a house and wharf covenants to repair, accidents by fire excepted; the house is burnt down and the lessor receives the insurance money and does not rebuild, but brings an action at law for the rent: bill lies for an injunction till the house is rebuilt.

Private letters.
Amb. 737.

Bill lies to restrain the executor of the person to whom private letters had been written from publishing them, without leave of the executors of the person who wrote them. *Vide title Injunction.*

A CERTIORARI BILL

(*Vide Certiorari*)

What.

[IS, whereby a special *certiorari* is prayed, to remove a cause out of an inferior court of equity, court of admiralty, or other inferior court, upon suggestion that the cause is out of its jurisdiction, or that the witnesses live out of the jurisdiction, or that the defendants do, and are not able by age and infirmity, or the distance of place, to follow the suit there, or that for some cause equal justice is not like to be done there, *&c. Terms de ley.*]

[Shep. 30.]

How drawn.
Mitf. Treat. 49.

The bill should state the proceedings in the court below, the incompetency of that court and pray a writ of *certiorari*; no appearance or answer is required, and consequently the writ of subpœna is not prayed.

How granted.
[Prac. H. Ch. 7.
3 Px. 20.]

[Such *certiorari* is granted by the Lord Keeper upon a certificate of the six clerk, that the bill is filed.]

How obtained.

[But upon receipt of the *certiorari* said, a bond, to his Honor the Master of the Rolls is to be entered into by

by the plaintiff before the Register, with condition, that the bill exhibited contains matter sufficient to bear a *certiorari*; and that the plaintiff prove the suggestion of his bill within fourteen days after the return of the writ (which is returnable *infra quatuor-decim dies post receptionem ejusdem* by the defendant): and if the plaintiff fail to make his proofs within the time, a *procedendo* may be awarded to the inferior court, except the plaintiff shall get an order in the meanwhile for further time to make his proofs, upon an affidavit of the remoteness of his witnesses.] [West. Pre. 257. b. 258. Toth. 52. Prac. H. Ch. 8. 16.] Hind. 30.

After the *certiorari* bill is filed and the bond entered into as aforesaid, a subpœna must be sued out and served; and the Register's certificate of security being given, and a certificate from the six clerk that the bill is filed, obtained, the writ must be moved for in court. How obtained. Hind. 29.

The writ of *certiorari* is directed to the judge of the inferior court, and requires him to certify or send to this court the tenor of the bill or plaint, with the process and proceedings thereon. The writ, being served and returned, with the process and proceedings, will upon motion be ordered to be filed. To whom directed. Hind. 29.

Interrogatories to prove the suggestions must be prepared and filed with the examiner, and the witnesses having been examined, an order must be obtained to refer the examination to a Master, and that the examiner attend with the depositions; and if it appear by the plaintiff's own shewing in his bill below, that he lives out of the jurisdiction of the inferior court, without proving any allegation, an order may be obtained to retain the bill; after which the defendant must put in an answer as if the cause had been originally instituted in the Court of Chancery; but if it be necessary to proceed upon the interrogatories, the Master's report must be obtained, and if he certifies the suggestions of the bill to be proved, the Court on motion will retain the bill on such report. Interrogatories. Hind. 30.

The *certiorari* bond is to be entered into by plaintiff and one security, in the penalty of 100*l.* to the Master of the Rolls and the senior Master in Chancery. Certiorari bond. Ibid.

[Though the plaintiff is to examine and have publication within fourteen days after the return of the *certiorari* to prove his surmises, and give the Court jurisdiction, the defendant is not to examine to or publish Publication.

publish any thing to disprove it: and though the defendant should examine as soon as answer, yet the depositions shall not be published but in ordinary course; for after the plaintiff's first examination to affirm the jurisdiction, if the Court retain the cause, both parties are to examine orderly to the merits and body of the cause, and have publication according to the ordinary rules.]

[Toth. 145.]

In what cases.

[Plaintiffs here sue for lands in the county palatine of *Durham*; one of them lives in the county of *Middlesex*, the other is an old infirm man and not able to follow the suit; therefore a *certiorari* was granted to the Chancellor of *Durham* to certify the proceedings depending before him into this court.]

[Ca. Rep. 68.]

1 Cha. Ca. 31.

Plaintiff brought a *certiorari* bill to remove a cause out of the Mayor's Court, his witnesses living out of that jurisdiction, and inserted other matters relating to an account not in controversy in the Mayor's Court. After examination of witnesses the defendant moved for a *procedendo*, and insisted, that if the cause should be heard here, he could not be relieved, not having any bill here: but a *procedendo* was denied, the bill containing other matters not determinable in the Mayor's Court; neither can the bill be divided; but the cause after hearing was dismissed out of court.

Rep. temp. Finch. 452.

After a decree to account in the Exchequer of *Chester*, the defendant shall not have a *certiorari* bill, upon pretence, that his witnesses and deeds are out of the jurisdiction.

2 Cha. Rep. 110.

The writ of *certiorari* does not lie upon *English* bill to remove *Latin* proceedings into this court.—*Sed vide* 4 *Geo.* 2. *c.* 26.

3 Cha. Rep. 67.

To a *certiorari* bill, the defendant pleaded a decree in the Mayor's Court, and an inrolment, which was said to be only pronuncial; and it was referred to the Master to certify, whether it was before the bill filed.

1 Vern. 178.

A *certiorari* bill lies to remove a cause out of a court of equity in a county palatine to this court.

Decree.

The Court may make a decree in a cause brought to a hearing upon a *certiorari* bill, or send it back to the inferior court to be determined there; the Register said, it had been often done both ways, sometimes after publication, and sometimes after a subpœna served

2 Vern. 491.

ſerved to hear judgment. This caſe was between an apprentice and his maſter.

Plaintiff in an inferior court of equity cannot remove proceedings into this court by *certiorari*. Plaintiff. Curſ. Can. 454.

The proofs made before anſwer in a *certiorari* bill are not to be uſed at the hearing; for they are only to give the Court juriſdiction, and the defendant could not then examine any thing on his part. Curſ. Can. 300.

BILLS OF CONFORMITY.

[THESE bills, by creditors agreeing to remit part of their debts to do the like, were ſometime heretofore uſed, but are now vaniſhed, having, for the inconvenience they occaſioned, been prohibited by proclamation. [Pra. H. Ch. 6.]

CROSS BILL.

VIDE

Anſwer.
Injunction.
Hearing.

[IS a bill brought by a defendant againſt the plaintiff in a former bill depending, touching the matter in queſtion in ſuch former bill.] What. Mitford, 75.

[Yet it ſhould be before publication is paſt on the firſt bill; but not after, except the plaintiff in the croſs bill is ready to go to a hearing in this ſuit upon thoſe depoſitions already publiſhed, becauſe of the danger of perjury, if the parties ſhould, after publication of the former depoſitions, examine witneſſes *de novo*, to the ſame matter before examined to.] Publication. [3 Pr. Alm. 14.]

A croſs bill is not bound to ſtate any ground of equity, at leaſt againſt the plaintiff, to ſupport the Equity. Hard. 160.

jurisdiction of the Court, because it is founded upon another bill already in court.

How drawn. Mitf. 76.

A cross bill should state the original bill, and proceedings thereon, and the rights of the parties exhibiting the bill, which are necessary to be made the subject of cross litigation, or the ground on which he resists the claim of the plaintiff in the original bill.

Answer. Curs. Can. 117.

The defendant in the original bill, must answer before the defendant in the cross bill shall be compelled to put in his answer.

Answer. Curs. Can. 117.

Nor by the course of the Court, can the plaintiff in the last bill, have process of contempt against the defendant, till eight days after his answer in the original cause is filed.

Answer. Contempt. Hind. 53.

In case the plaintiff in the cross cause should attempt to sue out process of contempt, the defendant may obtain an order to stay proceedings upon the cross bill, until the defendant in the original cause has fully answered the same.

Answer. Time. Hind. 54.

Defendant to the cross bill will be entitled to the usual orders, for time to answer the cross bill, after the answer to the original bill is filed.

Answer. 1 P. Will. 266.

A. files a bill against *B.* and *C.*, they put in insufficient answers, and bring in a cross bill against *A.*; *B.* becomes a bankrupt, his assignees bring their bill in nature of a bill of revivor against *A.*; they shall not proceed till *C.* has answered *A.*'s bill.

Answer. Process. Bunb. 124.

But if a man files a bill and takes out no process upon it, if a cross bill be filed, the plaintiff in the original cause cannot compel the defendant to answer his bill first, he having taken out no process on his bill.

Answer. Amended bill.

If plaintiff in an original bill amend his bill in things material after the cross bill filed, this amended bill as to the amendments is a new bill, and the plaintiff in the original bill shall be bound to answer the cross bill, which was filed prior to the amendments made to the original bill, before the plaintiff in the original bill shall have an answer to his amendments; and as the amended bill must be answered altogether, the priority seems in such case to be lost as to the whole.

2 P. Will. 435. 2 Atk. 218. 3 Atk. 724.

Cross bill in another court. 1 Vern. 221.

If there be a bill exhibited in one court of equity, there may be a cross bill in another, as if the mortgagor exhibits a bill to redeem in the Exchequer, the

the defendant may bring a bill in Chancery to foreclose.

The rule is not to ſtay proceedings in an original cauſe till the anſwer comes in to the croſs bill, but to ſtay publication only; but if the plaintiff in the croſs cauſe brings his bill before he has put in his anſwer to the original bill, then it is of courſe to ſtay proceedings in the original cauſe. Publication. Anſwer. 1 Atk. 21.

Where the defendant in a croſs bill, who is plaintiff in the original, is in contempt for not putting in an anſwer to the croſs bill, it is irregular to move to ſtay proceedings in the original cauſe till ſuch anſwer comes in; but the plaintiff in the croſs cauſe ſhould move to have publication in the original cauſe enlarged to a fortnight after the anſwer to his bill be come in. Publication. Anſwer. 1 Atk. 291.

If the croſs bill comes in before iſſue joined, and the plaintiff uſes his utmoſt to get in the anſwers, the Court will ſtay publication in the original cauſe, ſo as to give plaintiffs in the croſs cauſe an opportunity to examine, either in the original or croſs cauſe, to the points, which may be made by his croſs bill.—But if the croſs bill comes in after publication, or the plaintiff in the croſs bill does not ſtop publication in the original cauſe, he muſt proceed to hearing on the depoſitions already publiſhed, for he cannot examine any witneſſes after publication in the original cauſe to the points already examined to. Hind. 54.

After publication in the original cauſe, plaintiffs in the croſs cauſe moved for a commiſſion to examine witneſſes, which was granted, though it was urged that it would tend to cure the defects of that evidence, which had been adduced in the original ſuit.—*In the Exchequer.* Publication. Commiſſion. Dr. Scott v. Allgood and others. Eaſter 1787.

A croſs bill may be filed at any time before publication paſſes in the original cauſe.—*Exchequer.* Publication. Ibid.

In all caſes of a croſs bill filed after the original cauſe proceeded in, a motion to enlarge publication muſt be ſpecial, on notice, that the Court may judge of it on the circumſtances, and not of courſe as it is where the original cauſe is not proceeded in. Publication. Motion. 2 Vez. 336.

Original and croſs cauſes are uſually brought on together; but if one of the plaintiffs omits to ſerve a ſubpœna to hear judgment, his cauſe cannot be brought on without conſent. Hearing. Cur. Can. 345. Hind. 54.

Costs. 1 Vez. jun. 213.

Original bill dismissed without costs, and the cross bill being merely for a legal title was dismissed with costs.

Revivor. Hind. 51.

Cross causes not revived without a bill of revivor in each, except as to account decreed, and there a bill praying the whole may be revived, revives the whole.

A SUPPLEMENTAL BILL.

What.

[ANY alteration of the bill before the cause is at issue, is done by way of amendment (for which *vide Bill*).]

[But where new matter happens pending the suit, and after replication, or that the cause is at issue, which matter is necessary for the plaintiff to set forth to the Court, he may have leave to file a supplemental bill.]

Amended bill.

[So that a bill altered before the cause is at issue, is called an amended bill; if any addition or alteration be made after, it is by another bill, which must shortly recite or mention the former bill, and add, alter, and supply what is necessary.]

In what cases. Mitf. 60. Hind. 43.

It seems, however, that, according to the present practice, any matter which happens subsequent to the original bill, and gives a new interest to the matter in dispute to a person not a party to the bill; as the birth of a tenant in tail, or a new interest to a party upon some other contingency; or occasions a change of interest, as an assignment of a mortgage, may be introduced into the cause by a supplemental bill.

3 Atk. 133. Mitf. 60. Hind. 43.

Sometimes after a decree in aid of it to carry it into execution, where any matter in the original bill hath escaped the attention of the Court, or has not been put in issue by the bill, or by the defence made to it; and no directions have been given respecting such points; or, in fine, any event which makes an alteration with respect to the claims of any party to the suit, and does not occasion an abatement, the defect in the proceedings may be supplied by supplemental bill.

Where

Where a ſupplemental bill is merely to bring formal parties before the Court, the parties to the original need not be parties to the ſupplemental bill. Parties. Hind. 44.

Plaintiff brought a ſupplemental bill for diſcovery of more evidence touching an account, to which defendant pleaded the former bill, and that the cauſe was heard and an account directed; but he was ordered to anſwer to all matters in this bill not anſwered unto in the former cauſe, and the plaintiff not to reply or proceed any further without order. Plea. Former ſuit. 2 Cha. Rep. 142.

In a bill of review you may add a new ſupplemental bill. Review. 1 Vern. 135.

Where a ſupplemental bill is filed after publication, it is irregular to examine witneſſes to a matter which was in iſſue and not proved in the original cauſe, and ſuch proofs cannot be read. If there be no proof to the new matter in the ſupplemental bill, it will be diſmiſſed. *Bagnal* v. *Bagnal*. Publication. Vin. Abr. tit. Chan. 439. c. 8.

The taking out letters of adminiſtration may be charged either by way of ſupplement or amendment. Amendment. 3 P. Will. 351.

Where new matter is diſcovered ſince the decree, plaintiff may file a ſupplemental bill containing the new matter, and a petition of rehearing praying that the former decree may be rectified in the particulars complained of by the bill; but this is permitted only upon the ſame depoſit being made, as in the caſe of a bill of review. Rehearing. Barn. 468. 2 Atk. 178. S. C. Or. Ch. Oct. 1741.

Where aſſignees of a bankrupt die or are diſcharged, and others, by order of Court, are put in their room, they cannot revive, but muſt bring a ſupplemental bill to entitle themſelves to the benefit of a former ſuit. Aſſignees. 1 Atk. 88.

A purchaſer *pendente lite*, on filing a ſupplemental bill, is liable to all the coſts from the beginning to the end of the ſuit. Purchaſer. 1 Atk. 89.

An original bill was brought by a creditor againſt Mrs. *Higden* as adminiſtratrix of *A.*, who being a married woman, her huſband was alſo made a party. Before the hearing the wife dies; the huſband took out adminiſtration *de bonis non*, &c. of *A.*, upon which the plaintiff amended his bill againſt the huſband. The Chancellor ſaid, it was the conſtant rule, that matter ſubſequent to the original bill muſt come by way of ſupplemental bill and bill of revivor, and allowed a demurrer to the amended bill. Amended bill. 1 Atk. 291.

Publication. Amended bill. 3 Atk. 371.

After publication paſt, and the cauſe ſet down, you can only amend by adding parties and cannot introduce new charges, or put a material fact in iſſue, which was not ſo in the cauſe before, but a ſupplemental bill ſhould be preferred.

Decree. 3 Bro. 391. 1 Ves. jun. 404.

Where a ſupplemental bill brings a new perſon, or a new intereſt before the Court, it is open to the parties to make any objection to the decree, which might have been made at the firſt hearing.

BILL OF REVIVOR

(*Vide Subpœnâ ſcire facias, to revive*)

What.

[IS to revive a ſuit, and all proceedings thereupon, abated *pendente lite.*]

Scire facias. Mitf. 65.

[After the decree inrolled, the uſual way of reviving is by *ſubpœnâ ſcire facias*, though it is held, it may be by bill, and it is now the uſual practice.]

Who may revive. [Pra. H Ch. 3. 6.]

[The party plaintiff, or his heirs, executors, or adminiſtrators, who have the right of ſuit by privity of blood, or repreſentation, may exhibit this bill againſt the other party, his heirs, executors, or adminiſtrators.]

[This bill lies not for an aſſignee.]

[1 Ch. Ca. 174. 122]

[Nor can a deviſee bring a bill of revivor, he having no privity of repreſentation, but being in nature of a purchaſer only.]

2 Ch. Ca. 80.

[Where divers are plaintiffs, and the bill after hearing abates, ſome of them, without the reſt, may revive.]

1 Vern. 427. Eq. Ca. Ab. 3.

An aſſignee, or a purchaſer, ſhall not have a bill of revivor, for want of privity.

2 Freem. 132. Eq. Ca. Ab. 3.

A creditor allowed to come in and prove his debt, and pay his contribution, may revive, though he was not plaintiff originally.

1 Atk. 88.

Where aſſignees of a bankrupt die, or are diſcharged, and others are by order of Court put in their room, there is no privity between the bankrupt and aſſignees, and therefore they cannot revive.

3 Ch. Rep. 66.

If two joint-tenants, or tenants in common, exhibit their bills, and one releaſes or dies, the ſuit as to the other does not abate.

If

If the ſuit abates *by defendant's death*, the plaintiff may bring an original bill, praying a parallel decree, or a bill of revivor at his election, for he may make a better caſe than by the firſt bill. 1 Vern. 463.

On a bill of revivor, plaintiff cannot diſpute the decree, though defendant may. 2 Ves. 232.

[No anſwer is commonly neceſſary to this bill, but the defendant for his own benefit may, by way of anſwer or plea, ſet forth and ſhew cauſe againſt the revivor, as that the now plaintiff is not heir, *&c.* That he ſtandeth not in the like caſe, hath not the like intereſt, or the like cauſe of complaint, as in the former ſuit; or that the defendant is not the perſon ſubject to the demand.] Anſwer. [Toth. 14.] [Pr. H. Ch. 7.]

[Said, where proceedings may be revived by *ſcire facias*, it is at the party's election to do it by bill.] [2 Ch. Ca. 67.]

[Said, a bill of revivor muſt purſue the firſt bill; and if there is any (material) variance between them, the defendant may demur, and the bill of revivor will be diſmiſſed. Only if there be any new matter ariſing by the abatement, as aſſets in an heir's or executor's hands, the bill of revivor may pray a diſcovery; in which caſe the defendant muſt anſwer thereto.] How drawn. [1 Px. Alm. Int. Bill. Cary, 78. 2 Px. Alm. 78.]

In a bill of revivor, it may be neceſſary to inſert ſo much new matter as is needful, to ſhew how the party becomes entitled to revive. Com. Rep. 590.

[A bill cannot be revived in part, but the whole proceedings, *viz.* bill, anſwer, *&c.* and all orders muſt ſtand revived.] [2 Ch. Ca. 8.]

[Revivor upon revivor lies until the intereſt of the thing in queſtion be determined.] [Prac. H. Ch. 6. 1 Px. 17.]

[Said, a bill of revivor lies not upon a decree of long ſtanding; but the party may exhibit an original bill, and ſet forth the decree as evidence.] [1 Ch. Ca. 216.]

[Held, proceedings in croſs cauſes are not revived without a bill of revivor in each, except as to any matter of account decreed; and there a bill in one cauſe, praying the whole may be revived, revives the whole.] Croſs cauſes.

[A bill is exhibited againſt huſband and wife, touching a matter which concerns her only, they anſwer either together or apart, and the huſband dies. Here a bill of revivor muſt be brought againſt the woman, for ſhe ſhall not be conſtrained to abide by that anſwer which ſhe, together with her huſband, or ſolely as his wife, had Baron and feme.

had formerly made, becauſe ſhe was then under coverture, and her will and actions ſuppoſed to be under the guidance or influence of her huſband.] [Px. Alm. 29.]

[But if the matter in queſtion continue *in ſtatu quo*, as if the wife be ſeiſed or poſſeſſed of the lands, *&c.* in queſtion, as in her former eſtate, &c. it is in her election whether ſhe will abide by that anſwer ſhe made or not.] [Toth. 12.]

[A feme ſole anſwers, and afterwards (*pendente lite*) marries, the plaintiff may proceed againſt her without reviving, and the huſband ſhall be bound by the anſwers ſhe made whilſt ſole; for ſhe ſhall not be admitted to take advantage of her own act. But ſaid, that by leave of the Court, upon the plaintiff's motion, he is commonly made a party.] [Px. Alm. 29.]

[Said, if in ſuch caſe the plaintiff brings a bill of revivor, it may be diſmiſſed with coſts.] [Ca. Rep. 80, 81.]

[*Contrà*; if a feme plaintiff marries, by her own act ſhe abates the ſuit, of which the defendant may take advantage, and ſhe and her huſband muſt exhibit a bill of revivor.] [Px. Alm. 29.]

[A bill brought by a man and his wife; the defendant anſwers; the huſband dies. Whether ſhe will exhibit a new bill, or proceed on the old one by revivor, is at her choice.] [Ca. Rep. 100.]

[Baron and feme; plaintiffs, touching a promiſe made to a man and his wife to make them a leaſe for their lives. *Pendente lite* the wife dies. Held, there needs no bill of revivor; for the huſband claims nothing now in the right of his wife.] Ibid. 88.

Joint-tenants.

[Anſwer is put into a bill brought by joint-tenants, co-executors, joint-obligors, or obligees, and one of them dies, the ſurvivor needs not revive, *&c.* becauſe the right, &c. ſurvives to the other.] [Toth. 14.]

[It ſhould ſeem rather after decree, &c. pronounced.]

[Said, no defendant, or any who repreſent him, can or ought to revive in caſe of an abatement happening before the decree, or final order be ſigned and inrolled.] [2 Ch. Rep. 195.]

After a decree *to account*, a defendant may file a bill of revivor, if the plaintiffs, or thoſe ſtanding in their right, neglect to do it. 2 Vern. 296. Prec in Ch 197. 3 Atk. 691.

[Adminiſtrator *durante minori ætate* of an infant exhibits a bill, then the infant comes of age, there needs no bill of revivor.] [Px. Alm. 29] Infant.

[The ſame of executor in the nature of a guardian.] [Com. Sol. 25.]

Feme ſole.

[A feme ſole exhibited her bill, and marries; the defendant anſwers; and after would have taken advantage

vantage of the plaintiff's proceeding without revivor. It was ordered, that the defendant ſhould be examined upon interrogatories, whether before his anſwer he knew of the plaintiff's marriage; and if ſo, then the plaintiff to proceed without revivor.] [Ca. Rep. 73. 4.]

[Said, if upon a plea of outlawry, and the ſuit be put *ſine die*, after the reverſal, *&c.* the ſuit muſt be revived.] Outlawry.

[If a plaintiff dies after publication, his executors or adminiſtrators may not exhibit a new bill upon the ſame matter, whereby to make further proofs; but are to keep to a bill of revivor, and to proceed upon the examinations already publiſhed, if they will go on.] Death of plaintiff. [Toth. 174.]

[A decree was ſigned and inrolled, omitting part of the matter decreed by the decretal order; the defendant being dead, (ſo that there was no helping it by motion,) the bill of revivor was brought to revive (as was alledged) that part of the decree omitted, though in truth it went to the whole decree. The defendant pleads, *&c.* that the decree being inrolled, a bill lay not, but a *ſcire facias*. The plea and demurrer were over-ruled. And it was ſaid, a *ſubpœnâ ſcire facias* would only have revived the decree, and the proceedings before it, not thoſe ſince.] Scire facias. [1 Ch. Ca. 37.]

[A bill was brought to revive a decree, where there had been ſome proceedings touching coſts after the decree, and adjudged good.] Coſts. [2 Ch.Rep. 67.]

[This bill lies not to revive a decree made for coſts only.] [2 Ch. Ca 7.] [2 Ch.Rep. 195, 246.]

A bill of revivor may be brought for duty and coſts not taxed in defendant's lifetime, but not for coſts alone. Bunb. 160. 3 Atk. 772. 812.

If a bill of revivor revive more than it ought, it will be bad; as where the bill ſought to revive all the proceedings, and particularly an order by conſent, which conſent was determined by the marriage of the *feme* executrix, who was a party to it. The demurrer was allowed. 2 Ves. 462. 465. 580 1 Bro. 438. Ch. Ca. 77.

[If upon this bill a defendant appears, but does not ſhew good cauſe againſt the revival, the ſuit is put in the ſame plight thereupon, as before the abatement.]

[So it is after the time for anſwering is out, but it is now held the defendant muſt appear.] Appearance.

In a bill of revivor, merely the defendant muſt appear in a town cauſe, in four days excluſive, of the ſervice of *ſubpœnâ*; or in default, proceſs of contempt may be iſſued, and in eight days after appearance, either ſhew Appearance.

cauſe

Hind. 48. cauſe againſt the bill or ſubmit to anſwer; and in default, the ſuit may be revived without anſwer, if none be required upon motion as a matter of courſe. This motion is made upon an allegation that the time allowed for anſwering by the courſe of the court is expired.

Anſwer.

If defendant by anſwer only (not by plea or demurrer) inſiſts plaintiff is not entitled to revive, yet the Court on motion will order proceedings to be revived. But if plaintiff does not ſhew a good title to revive, he will fail at the hearing.

3 P. Will. 48.

1 Ch. Ca. 37. If part of the decretal order be omitted in the decree ſigned and inrolled, plaintiff may revive by bill of revivor.

If a bill of revivor revive the whole decree, which was to pay money and to convey lands, it may ſtand as to the perſonalty, if the executor only revives, and not as to the realty, though the demurrer to the bill be general.

Eq. Ca. Ab. 4.

1 Vern. 308. A defendant who has not anſwered, may be omitted in the bill of revivor.

Eq. Ca. Ab. 2. If one plaintiff refuſe to join in revivor, another may bring ſuch bill and make him, who refuſes defendant.

Anſwer to a bill of revivor to revive part of an order omitted in the inrolment of the decree tended to draw into queſtion and re-examination matters formerly ſettled. An order was made that ſuch matters as were examined to before, be not re-examined. *Sed quære.*

Ch. Ca. 56.

2 Vez. 399. By conſent of all parties intereſted, the Court may order money to be paid out of court without reviving the ſuit.

Money in court.

BILL OF REVIEW.

VIDE

Error.
Decree.
Infant.

What. [IS to examine and reverſe a former decree upon error of law appearing in the body of the decree itſelf, without averment or further examination of any matter of

of fact before the decree, or of any matter resting upon record, which might have been had at the time of the decree.] [Prac H. Ch. 8. Px. Alm. 45.]

[As in case of revivor, so here, only parties or privies can ordinarily bring this bill.] Parties or privies.

[Yet in some cases, where a man is affected and grieved by a decree, he may have this bill; as where a parish was sued, and four of the parishioners named only to defend, another parishioner may bring this bill.] Ch. Ca. 272.

A devisee is not entitled to a bill of review of a decree against the testator, not being in privity to him. Devisee.

Assignee cannot in any case have a bill of review. Assignee. 1 Vern. 417.

[Leave to bring this bill may be had on petition or motion] *supported by an affidavit*, stating that the new matter discovered could not be had or used at the time when the decree was made; and that the party or his agents were not then apprized thereof; but that it came to their knowledge since the decree, or since the time when it could have been used for his advantage in the same cause. How to obtain leave to bring review. 1 Ves. 434. 2 Ves. 576. 2 Atk. 178. 3 Atk. 35. Hind. 56.

[In case of any dismission, not on hearing, if a new bill be irregularly brought, the dismission is to be pleaded.] Dismission to be pleaded.

[Though this bill cannot be brought on matters in fact, or upon other record than the decree, yet if there be oath made of the discovery of such new matter, which could not possibly be had or used at the time when the decree passed, a bill of review may be exhibited by leave of the Court, *non aliter*.] 2 Atk. 178. 2 Ves. 576. 2 P. W. 283. [Toth. 48.]

But the new matter discovered since must be shewn to be relevant, or the Court will not, merely because it is new matter, direct a new bill to be brought, where it is entirely vain and fruitless. New matter relevant. 2 Atk. 529.

[But where a cause is dismissed upon full hearing, and the dismission is signed and inrolled, it cannot be retained again but by bill of review, and that in some special cases.] Dismission upon hearing. [Px. Alm. 45.]

[This bill was brought upon a suggestion that the plaintiff would now prove a tender and refusal, which he could not prove before, but upon search of precedents none warranting it, it was dismissed.] [2 Ch. Rep. 66.]

[But in case of misrating or misnumbering only, that being a matter demonstrative, it may be explained and reconciled by order without bill of review.] Misrating rectified. Ld. Bac. Ord. 2. [Toth. 42.]

[Heretofore this bill should not be brought, except the party who preferred it entered into a recognizance with sureties, Sureties formerly found.

[Pr. Alm. 45. Toth. 47.] ſureties, to ſatisfy coſts and damages for delay, if the matter ſhould be found againſt him.]

Depoſit. [But by a late order, 10 *l.* were to be depoſited in court for ſecurity; and by a later order, 20 *l.* are to be depoſited.]

But now by order, reciting, that no bill of review, grounded upon new matter diſcovered ſince the decree, ſhould be exhibited without ſpecial leave, and a depoſit of 50 *l.* And that in certain caſes where the former decree was not ſigned and inrolled, a petition had been preſented to rehear the original cauſe, and a ſupplemental or new bill, in nature of a bill of review grounded upon new matter, had been brought to revive or vary the former decree without leave or depoſit. *It was ordered*, that no ſupplemental or new bill in nature of a bill of review, grounded upon new matter diſcovered ſince the making of the decree, ſhall be exhibited without the ſpecial leave of the Court; and unleſs the party exhibiting the ſame do firſt depoſit with the Regiſter, ſo much money as together with the depoſit by the rules of the Court to be made, on obtaining a rehearing of the cauſe, wherein ſuch decree was pronounced, will make up the ſum of 50 *l.*

Depoſit.

Supplemental bill.

Ord Ld. Hard's. 17 Oct. 1741.

2 Atk. 139.

A decree having been made at the Rolls in 1743, but not *ſigned and inrolled*, a bill in the nature of a bill of review was brought for matters exiſting before, but not then diſcovered, but no petition to rehear or appeal, which Lord *Hardwicke* thought neceſſary, and the cauſe ſtood over that one might be preſented.

2 Ves. 596.

The office of the bill in nature of a bill of review, when the decree is not ſigned and inrolled, is to ſupply the defects which occaſioned the decree upon the former bill, which could not be done by bill of review, unleſs the decree were ſigned and inrolled, and a man ought not to be put to ſign and inrol a decree merely to entitle him to bring a bill of review to reverſe it.

2 Atk. 178.

Rehearing. Depoſit. When made. [Said, tis uſual to ſet down a cauſe for rehearing, before the 20 *l.* be depoſited; and it is perhaps well enough if the depoſit be made ſome convenient time before the day of hearing.]

Decree muſt be obeyed. [A bill of review ſhall not be admitted, nor any other new bill to change matter decreed, till the party hath obeyed the decree in all things, which ſtand upon the ſtrength of decree only, and wherein the Court can ſet him

Ld. Bac. Ord. 3.

him in as good a ſtate again, as he was in caſe the former decree happen to be reverſed.] [Toth. 42. Prac. H. Ch. 8.]

[As where the decree is to yield poſſeſſion of land, deliver writings, or pay money, he muſt firſt perform theſe, except the court ſee cauſe to diſpenſe with the non-performance of any thing of this kind; as in caſe money be decreed, the Court will perhaps diſpenſe with it, upon giving good ſecurity; *but* ſuch ſparing or diſpenſing is to be warranted by public order made in court.] Except in ſome inſtances. Ld Bac. Ord. 40 [Px. Alm. 42. Toth. 42. 1 Ch. Ca. 42.]

[But if the decree requires any act to be done which would extinguiſh the party's right at common law, as conveying lands, releaſing a debt, or acknowledging ſatisfaction, cancelling records, or evidences, and the like; thoſe parts of the decree are to be ſpared, and will of courſe be ſtayed by order of court, till the bill of review be determined.] Except in ſome inſtances.

Plaintiff allowed to bring a bill of review without paying the coſts decreed in the original cauſe, upon making oath, that he was not worth 40 *l.* beſides the matter in queſtion. Except in ſome inſtances. 1 Vern. 264.

This order for diſpenſing with the coſts ought to be ſet forth in the bill of review. 1 Vern. 292.

[But the plaintiff in review muſt move for an order to ſtay what is proper to be ſtayed, if he expects to have it ſo.]

[Said, no witneſſes which were or might have been examined on the former bill, ſhall be examined to any matter on the bill of review.] Witneſſes. [Toth. 173.]

Papers coming to the hands of a party to a former cauſe after publication paſſed, though not produced then, may be read upon a bill of review. Evidence. 2 Atk. 179.

[After a bill of review had been diſmiſſed, the party brought another, ſuggeſting further error, but was diſmiſſed; for *intereſt reipublicæ ut ſit finis litium.*] No new bill after bill of review. [2 Ch.Ca.113.]

A bill having been taken pro confeſſo, a bill of review was brought, and a demurrer allowed. A new bill of review was brought; demurrer, that a bill of review lies not after a bill of review. 1 Vern. 235. 441.

[Though there has been error in a decree, yet if it has been reſted under 16 or 20 years, the court in ſome caſes will not reverſe it upon a bill of review.] After what time. [1Co.Rep.140.]

Bill of review will not lie after an account had been directed and taken on a foreclosure bill, and the report confirmed ſix years. 2 Atk. 534.

After what time.
1 Vern. 287.
3 Atk. 38.
1 Bro. P. C. 95.
Amb. 645.

Where 20 years have elapsed from the time of pronouncing the decree, and the decree has been signed and inrolled, a bill of r view will not lie. The time runs from the pronouncing the decree, not from the inrolment.

4 Bro. 441.

Though a bill of review cannot in general be brought to reverse a decree after 20 years, yet that bar does not apply to persons having contingent interests, and then not existing or under disabilities.

1 Vern. 166.

Upon a bill of review, the party cannot assign for error, that any of the matters decreed are contrary to the proofs in the cause; but must shew some error appearing in the body of the decree, or new matter discovered since the decree made.

Nel. Ch. Rep. 196.

Upon a bill of review, no proofs are to be admitted but such as were in the original cause.

1 Vern. 290.

Said, that a fine and non-claim is a good bar to a bill of review, if the party be not in prison.

1 Vern. 292.

When a decree comes to be reversed on a bill of review, it ought to be either because it was *unjust in matter of law*, arising within the body of the decree, or for that the Court wanted or exceeded its jurisdiction.

How decrees must be drawn up.
1 Vern. 224.

The facts upon which the decree is founded, must be particularly mentioned in the decree itself; otherwise, if a bill of review were brought, those facts shall be taken as not proved, for else a decree could never be reversed by a bill of review: but all erroneous decrees must be reversed upon appeals.

3 W. 371.

If a decree be obtained and inrolled, so that the cause cannot be reheard upon a petition, there is no remedy but by bill of review, which must be upon error appearing upon the face of the decree, or upon some new matter, as a release, or a receipt discovered since.

Demurrer.
2 Atk. 290.

On arguing a demurrer to a bill of review, nothing can be read but what appears on the face of the decree. But after the demurrer is over-ruled, the plaintiffs are at liberty to read bill and answer, or any other evidence as at the hearing.

Demurrer.
2 Vern. 120.

Where a demurrer to a bill of review is allowed, it may be inrolled; but if over-ruled, that cannot be inrolled, so as to prevent the demurrer being reargued.

Decree not inrolled. Supplemental bill.
2 Atk. 178.

Where a decree is neither signed nor inrolled, you cannot bring a bill of review for new matter discovered since the hearing, but a supplemental bill, in the nature of

of a bill of review; but it is necessary to have the leave of the Court to bring this bill.

A supplemental bill may be added to a bill of review, or if necessary, it may be a bill of revivor. 1 Vern. 135.

If a man have less decreed him than he would have, he shall not bring a bill of review, for this bill lies only for him against whom the decree or dismission is. Cha. Ca. 58.

Bill to establish right of common and to set aside several decrees. Demurrer to the whole bill; for if there were any error in the former decrees, there should have been a bill of review. Demurrer allowed. Demurrer. Bunb. 56.

The defendant generally puts in the usual demurrer, that there is no error in the decree, he rarely or ever answers, unless ordered thereto by the Court, and the demurrer being set down to be argued, the Court proceeds to affirm or reverse the decree, and the prevailing party takes the deposit. Defence. Demurrer. Gilb. Chan 187.

When a bill of review is brought for error apparent, the usual method is for the defendant to put in a plea and demurrer; a plea of the decree, and a demurrer against opening the inrolment, so that in effect a bill of review cannot be brought without having the leave of the Court in some shape; for if it be for matter apparent in the body of the decree, then, upon the plea and demurrer of the defendant to the bill, the Court judges whether there are any grounds for opening the inrolment; if it be for matter come to the plaintiff's knowledge after pronouncing the decree, then, upon a petition for leave to bring a bill of review, the Court will judge if there be any foundation for such leave. 2 Atk. 534.

A bill of review should state the former bill and the proceedings thereon, the decree and *gravamen* of which the party exhibiting the bill complains, the ground of law or new matter discovered upon which he seeks to impeach the decree, praying that the decree may be reviewed and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may pray the decree of the Court to put the party complaining of the former decree into the situation in which he would have been, if that decree had not been carried into execution, and a writ of subpœna to appear and answer. How drawn. Hind. 57.

If a decree be made against a person who had not such an interest as to render the decree against him binding upon persons claiming after him, relief may be obtained When filed. Without leave.

against error in the decree, by a bill in the nature of a bill of review. If a decree be made against a tenant for life only, a remainder-man in tail, or in fee, cannot defeat the proceedings against the tenant for life, but by a bill shewing the error in the decree, the incompetency in the tenant for life to sustain the suit and the accruer of his own interest.

Hind. 66. A bill of this nature, as it does not seek to alter the decree against plaintiff himself, or against any person under whom he claims, may be filed without leave of the Court.

CERTIFICATE.

VIDE

Report.
Contempt.
Commission.
Costs.
Issue at Law.

What. [CERTIFICATE (as it immediately concerns the administration of equity in this court) is a matter in writing under the hand or hands of assistants, officers, ministers, or delegates, of the Court, informing the Court of something under their respective administration or cognizance that is done, not done, or misdone; which a standing or other order, or the mandate of the Court, or their duty, or the reason of the thing requires them to acquaint the Court with. And these the Court gives much credit to, especially from the assistants and standing officers of the Court.]

Answer. [In the caption of an answer taken in the country, the town and county where, and the day and year when the answer is sworn, ought to be inserted; otherwise the answer may be quashed.]

[So it is in the caption of affidavits, depositions, &c. *Vide* Affidavit.]

[The Court may be shewed such omission by an office-copy, or it may be referred to a Master to examine.]

[The

[The certificate of commissioners, of any thing touching the execution of their commission, ought to be filed before it be read.] When filed.

CERTIORARI.

VIDE.

Bill.

[THIS writ (as it concerns proceedings here in a way of equity) is commonly directed to a Judge of some court of equity, admiralty, or other inferior court, requiring him to certify or send to this court the tenor of a bill or plaint, with the process and proceedings thereon.] How directed.

[But it is sometimes directed to others to certify some record necessary in a cause depending here; as, to the Clerk of Parliament, to certify the tenor of an act of parliament; to the Treasurer and Chancellor of the Exchequer, to certify whether a manor be held of the crown in ancient demesne, *&c.*]

[This writ is not granted to remove proceedings in a cause, till the plaintiff produces a certificate from the six clerk that the bill is filed, and before the Register enter into bond to the Master of the Rolls, to prove the suggestion of his bill within 14 days of the retorn of the writ, which is usually made retornable within 14 days after receipt thereof.] When granted. Boh. 453. [Prac.H.Ch.7.]

[Because a *certiorari* was made with a long retorn, (skipping a term) a *procedendo* was awarded. *Tot.* 161.] Procedendo.

[This writ lies not upon *English* bill to remove *Latin* proceedings out of a court of law into this court, which cannot in that way hold plea thereupon.] When it lies. [2Ch.Rep.109.]

[A plaintiff in an inferior court of equity shall not remove the proceedings hither by *certiorari*.] [Ibid.]

CHANCELLOR AND CHANCERY.

[THE Lord Chancellor hath no patent for his office, seeing he is intrusted with the seal itself, where-

with all patents are sealed; but he receives his authority
[Chamb. 180] by the Queen's delivering him the great seal.]

[Chancellor and Keeper of the great seal seem but different words or titles to express the same office; for by 5 *Eliz. c.* 18. their office and power are declared to be in all respects the same.]

[The Chancellor hath by virtue of his office two more remarkable powers: the one ordinary, of issuing out original and other common law writs, putting the great seal to the Queen's patents, *&c.* and in some cases, of holding plea and judging according to the course and rules of the common law: in all which respects this Court acts as, and is, a Court of Record, and seems to have this power devolved to it as a part of that which is said to have been (for some time after the Conquest) exercised in the *Aulâ Regis*, before the division of the multiform jurisdiction of that Court.]

[The other (and which is more to our purpose) is a power of relieving according to equity in particular cases, where the law gives no remedy, or not a sufficient one, or where the general rules of law press too hard, in some instances; touching which the pro-
[Rol. Ab. 374.] ceedings are in *English*, by bill or petition, (though the process be in *Latin*,) and are not strictly records. Nor is the Court, as to this purpose, a Court of Record.

[Though these several kinds of jurisdiction are exercised by the Chancellor, yet are they perfectly distinct. So that if in a cause depending in chancery, after the manner of the common law, a matter of conscience do arise upon it, the Chancellor cannot upon the proceedings in *Latin* adjudge according to equity, but according to common law only.]

[2 Ps Alm. 47.] [So on the other hand, if it be necessary or most proper that a title or fact be tried in a course of law, in order to a decree in equity, the Chancellor does not try it; but either dismisseth it to law, where the plaintiff must in a mere adversary way affirm his title, before he be allowed to proceed here; or the Chancellor orders an issue to be tried thereupon in the Common Pleas, or other court at law; and after, to resort to him in equity.]

[Decrees in a way of equity bind the conscience of the party, *&c.* And the Court will compel a performance by commitment or sequestration; or by putting the party into possession, and securing him in it. But a decree gives no legal estate or property.]

[Besides

[Besides these two greater powers, the Chancellor hath several others; some by virtue of his office, some by statute, but there is no need to mention them here.]

[Fraud, accident, and trust, are the general subjects of equity.] [1 Roll. Abr. 374.]

[The King may sue in chancery for equity.] [1 Roll. Ab. 373.]

[The Chancellor himself may be relieved in chancery. But he cannot make a decree in his own cause, for that were against all reason and equity.] [Ibid.]

[The Chancellor of an inferior court of chancery cannot sue there, and therefore he may sue here, else there would be a failure of right.] [Ibid. 374.]

[A decree of an inferior court of equity may, by a new bill exhibited in this court, be again decreed here, in aid and corroboration of it.] [Toth. 46.]

Vide 1 Cha. Rep. 288. for more on this subject.

CLERKS IN CHANCERY.

THE next to the Masters are six clerks, who are under the direction of the Master of the Rolls, by whom they are appointed, and are of antient continuance.

[To them belongs the drawing up all patents, commissions, warrants, licences, and pardons, that pass the great seal of England; for which cause they are called *Clerici Scribentes in Rotulis*; as appears by certain constitutions made for ordering this court, *anno* 12 *R.* 2. since which they have been specially assigned amongst other officers of the crown, to attend at the King's coronation.] [2 Px. Alm. 120.]

[Their oath is, "You shall swear, that well and "truly you shall serve the Queen and her people, in "the office of one of the six clerks in chancery, where-"unto you be admitted; and well and justly order "yourself in the same, according to your learning; "and truly counsel them that you shall be retained "with: and you shall be diligent to further the "Queen's business from time to time, as need shall "require. And you shall not assent to any fraud or "deceit to be had or done by you, or any by your "consent, in any of the Queen's records whereunto "you shall have recourse: but well and truly you

"shall entreat the same. And you shall not absent "yourself willingly, whereby the Queen's business, or "any other, shall be undone or hindered, without special "licence from the Master of the Rolls, or his deputy "for the time being."]

[These clerks were heretofore obliged constantly to keep commons together in term time, but it is disused.]

[They are the proper and only attorneys of the court; and one of them is for the plaintiff, another for the defendant, in every cause. *O.* 135. To them originally belongs the making all equitable process: the copying as well as filing and keeping of all the proceedings and records in a cause of equity.]

[They ought continually to inform themselves of their client's causes, and give account thereof to the Court, as attornies in all other courts do; and not leave the care and knowledge thereof upon their under clerks, who attend not in court; and the clients, ~~and such~~ as follow their causes, are to acquaint them for that purpose.]

[But business daily increasing, they have had clerks under them increased, and added by themselves without number. Sometimes a certain number has been added by the Court; and several times the number has been reduced and lessened by the same. They were lately ninety, but are now reducing to sixty. These clerks not only write the process and copy proceedings, but do now manage causes, attend the court, *&c.* And they account to the six clerk, as the entering clerks and attornies do to the Prothonatories of the Court of Common Pleas.]

[The under clerks are also to be sworn, and their oath is, "You shall swear, that you shall not wittingly do, procure, or consent unto any thing "whereby any of the records, rolls, pleadings, books, "or writings, of or belonging unto the Court of "Chancery, which shall be under the keeping or charge "of the Master of the Rolls for the time being, or of "any of his clerks or ministers, or which shall come "to your hands, or whereunto you shall have recourse, "shall be embezzled, falsified, corrupted, razed, or "defaced; or whereby any corruption, fraud, or deceit may be done. But shall well and truly entreat "and deal with the said records and writings, according "to your best knowledge and understanding. And that

"you

"you shall do your utmost endeavours for the safe and "secret keeping of all examinations and depositions of "witnesses, that shall be delivered unto you, or shall "come to your hands, without opening, publishing, "or disclosing, till publication be granted by the Court, "or otherwise by the assent of the parties, or their attor-"nies, according to the course of the same Court."] Or. Chanc. 132.

[In the 20 *Car.* 2. an order was made by Sir *O. Bridgman*, *C. S.* and Sir *H. Grimstone*, Master of the Rolls, for reducing the under clerks to 60.]

[By the same order, when a vacancy happens, none shall be nominated for the place, by the six clerks, unless the nominee have been educated in the office, and have served seven years at the least, as a clerk under some of the six clerks; and be of honest and civil behaviour, and otherwise fitly qualified for the employment.]

[That none be permitted to practise in the office as an under clerk, but such only as shall be duly sworn and admitted; after which they shall not be deprived, suspended, or hindered, &c. but by judgment of the Lord Keeper, or the Master of the Rolls for the time being.]

[By an order 18 *Car.* 2. the business was divided among the six clerks, by portions of the letters of the alphabet wherewith the plaintiff's surname began. But that was repealed by another order, 1 *Feb.* 20 *Car.* 2. and clients allowed to choose their own attorney.]

[In *June* 1687, upon a surrender of one *Browne* (one of the six clerks) of his office, to the Master of the Rolls, his Honour deputed the same person to act as his deputy, during his pleasure; who was to sign all proceedings, *&c.* thus: *Arnold Browne, Deput. Magistri Rotulorum.* And the same deputation was inrolled in this court; and Mr. *Browne* was sworn for the due execution of his deputation. Whereupon reciting all this, his Honour required the under clerks belonging to that division to apply, *&c.* to Mr. *Browne*, and directed his order to be entered with the Register, and put up in the office of six clerks.]

[The six clerks have the right to inrol all warrants for patents whatever, notwithstanding any grant to any other person for doing it. And the warrants are to be delivered to the riding clerk, *pro tempore*, in order to be inrolled.] [Ord. Canc. 175.] [Or. Chanc. 85.]

[None

[None that shall counterfeit any *subpœna*, shall be permitted to write under, or for any clerk in the six clerks office.] [Or. Chanc. 70.]

[The Court has sometimes fined the six clerks for non attendance.—1 *Junii* 1650. Five of them were fined 10*s*. a-piece to the poor, to be received by the Usher of the Court. But it was (I suppose) in a cause wherein they were ordered to attend.] [Or. Chanc. 51.]

[Upon the death of a six clerk, (while the business was done by the six clerks, according to the division of the letters of the alphabet,) the Court appointed his deputy to do the business, and receive the fees during the vacancy, without prejudice to the Master of the Rolls.] [Or Chanc. 30.]

[*Note*: The King gave them liberty and power, and my Lord Keeper and the Master of the Rolls allowed and approved of dividing and doing the business according to the division of the letters.]

[A clerk refusing to deliver copies of pleadings to the client, till he was paid what the Solicitor owed him, the party moved the Court. Ordered, he have the copies, paying what the Solicitor owed in that cause. The six clerks inrol the warrants of all such leases as pass the great seal.]

[If any under clerk, after his receipt of the fees, or after delivery to his client, or any on his behalf, any writs, exemplifications, or copies of proceedings, shall not duly account for and pay what belongs to every six clerk, to whom he is accountable and ought to pay for the same, according to the established rates and proportions, without wilful delay or concealment; then upon complaint and proof before the Lord Keeper or Master of the Rolls, such under clerk so offending, shall (besides such remedy as the six clerk has against him) undergo such punishment as the Lord Keeper or Master of the Rolls thinks fit. And the rather, because by these rates, the six clerks abate much of what they used to have.] [Or. Chanc. 135.]

[No copies of pleadings, commissions, depositions, certificates, or other records usually dispatched in the six clerks office, shall be delivered out to any client, till they be signed by the six clerk to whom it belongs, or his deputy; or in his or their absence, by some six clerk, not towards the cause.] [Or. Chanc. 136.]

[To which purpose, and for signing writs and receiving commissions, each six clerk is enjoined to have

have one deputy at least, constantly attendant in the office.] [Or. Chanc. 137.]

[The 18 *Car.* 2. the under clerks grown numerous, were by order of Court reduced to 72 afterwards to 60.]

[But, the number of 10 under clerks allotted to each six clerk, is by order inrolled: and by order and decree of Chancellor *Jeffries*, and the then Master of the Rolls, the same was increased five more; so that they are in all 90, which number was then also ordered to continue, unless the Court should find it necessary to reduce, abridge, or increase the same; and that upon any vacancy by forfeiture, surrender, or death, the Master of the Rolls should admit such into their respective places, as he should think fitly qualified. The nomination of the six clerks being only for his Honour's information; and their presence at swearing, being only that the six clerk may take notice of such new under clerk.] [Or. Chanc. 181, 182.]

[None shall write or dispatch business in the office as a clerk, or have access to, or copy the records, but the six clerks, sworn clerks, and their clerks; which the six clerks and sworn under clerks are to observe, on peril of the forfeiture of their places. *Vide* Records.] [Or. Chanc. 182, 184.]

[No Master is to deliver any answer or pleading to any but a six clerk, or sworn under clerk. Nor is any six clerk, upon pain of his place, to deliver any of them to any but a sworn clerk, or to their respective waiting clerks, for whom they are to be answerable. And no sworn clerk on peril of his place is to deliver them to any but his clerks or servants, for whom he is to answer, except by order of the Lord Chancellor, Master of the Rolls, or the Court.] [Or. Chanc. 183, 184.]

[No clerk belonging to any Master, or to either of the examiners of the Court, shall take upon him, either by himself, or any other under him, the managing or soliciting any cause whatever; under pain of suspension, and of being committed to the Fleet.] [Or. Chanc. 202.]

[The under clerks are not to make any noise or disturbance, or commit any disorder in the office, or cause the office to be shut up, or endeavour to cause any of the sworn clerks, or their clients, to depart from or leave the same. And the office is not to be shut up, but upon such holidays as are kept by the Court in term time; and such only in vacation as shall be appointed by act of parliament, or public

authority. And no under clerk shall, during his clerkship, wear a sword within the cities of *London* and *Westminster*, or the liberties thereof; or be covered or wear his hat in the presence of any sworn clerk: but shall behave themselves orderly and soberly, and with respect to all the sworn clerks and suitors of the Court. And if any under clerks shall be idle in the office, or out of their Master's seats, they shall upon the admonition or command of any sworn clerk, immediately repair to their Master's seats: and shall quietly sit and mind their Master's business there, from seven of the clock in the morning in summer, and eight in the winter, till twelve at noon: and from two in the afternoon, till such time as their respective Masters shall think fit. If any of them shall be guilty of any of the aforesaid, or of any other abuses, disorders or indecencies in the office, they shall be punished by expulsion, or otherwise, as the Lord Chancellor or Master of the Rolls shall think fit.] [Ord. Ch. 193, 194.]

[By a former order, the serjeant at arms was to take them into custody, and commit them to Bridewell: and for a second offence they were to be expelled the office, and it extended to servants and waiters.] [Ord. Ch. 177.]

[No six clerk shall take above two waiting clerks at a time; and none but such as hath been an articled clerk to a sworn clerk of the office.] [Ord. Ch. 194, 195.]

[No sworn clerk shall have more than one articled clerk at a time: nor shall take a second, till the first be preferred in the office, or discharged by the appointment of the Lord Keeper or Master of the Rolls. If he does, the second article is to be, *ipso facto*, void, and of none effect.] [Ord. Ch. 195.]

[No sworn clerk shall carry any records out of the office, without leave of the Master of the Rolls; nor employ any person in copying records, but articled clerks; unless in case of sickness, or that the articled clerks refuse or neglect to do the same; whereof complaint is immediately to be made.] [Ord Ch. 195.]

[In case of a complaint of misbehaviour of clerks, the messenger attending the Court is commonly ordered to give the parties notice to attend.] [Ord. Ch. 191.]

[Before patent rolls are brought over to the chapel from the six clerks, with their warrants, the clerk of the petty-bag is to examine the extracts with the rolls, and

and to ſend the extracts into the Exchequer; and the rolls and warrants into the chapel, after three years from the time of the inrolment.] [Ord. Ch. 64. 157. 170.]

[The defendant beſpoke of his clerk, a *ſubpœna* for coſts for want of a bill, who inſtead thereof made a *ſubpœna ad reſpondendum*, for want of an anſwer; whereupon the firſt plaintiff was intituled to coſts for the irregularity. The Court ordered, that neither party ſhould have proceſs for coſts: but that the firſt defendant might take a *ſubpœna* againſt the clerk, for the forty ſhillings coſts which he ſhould have had of the plaintiff.] [Ca. Rep. 111.]

Under the order 18 *June* 1668 the ſix clerks are entitled to receive their proportion of the fee from the ſworn clerk, though he may have given credit to the client. 3 Ver. jun. 589.

CLERK OF THE SUBPŒNA-OFFICE.

[HE alone is to make out *ſubpœna's ad reſpondendum*; writs of *duces tecum*; writs to examine witneſſes, *in perpetuam rei memoriam*; or writs to ſhew cauſe on orders.] [Ord. Ch. 70.]

CLERK OF THE HAMPER.

[THE clerk of the hamper, or hanaper, is ſometimes called warden of the hamper.]

[His office is to receive all monies due to the Queen for the ſeals of charters, patents, commiſſions and writs, and fines due upon writs; as alſo the fees due to the officers for inrolling and examining the ſame.]

[He is obliged to attend the Lord Keeper every day in term time: and at all other times when the ſeal is open, having with him leathern bags (but probably hampers in old time) wherein are put all writs, *&c.*

after

after they are sealed with the great seal: which bags being sealed up by the Lord Keeper, with his private seal; are by this officer delivered to the comptroller of the hamper, to be disposed of by him as belongs to his office.]

THE SIX CLERKS OF THE ROLLS CHAPEL

[ARE appointed by the Master of the Rolls, under him to take care of the records and rolls kept there.]

COMMISSION AND COMMISSIONERS.

[COMMISSIONS are of divers sorts, and are directed sometimes to the sheriff, or other officer or minister of the Court; sometimes to other persons; for the doing somewhat necessary for the carrying on the proceedings in a cause, or to the determination thereof; or for the perfecting of, or inforcing obedience to an order or decree of the Court; or by reason of some contempt.] As,

A Commission to assign a Guardian.

[WHICH is granted where there is some incapacity in a defendant to answer or defend his suit himself; and is obtained by order on motion] *ex parte*, and the order is not served.

Hind. 247.

If

If for an Infant.

[THE commissioner directs, that the commissioners call the infant before them, and assign and admit him such guardian as he shall choose, to answer and defend the suit for him: and when they have so done, to certify and return his name and the writ, *&c.*]

[If it is apprehended, that it is designed the infant will choose a person privileged from suit, as a member of parliament, *&c.* The Court on shewing this, will order that the person assigned be not a privileged person; and the commission must be with a proviso for that purpose.] Member of parliament. [Cl. Tot. 233.]

To assign an Infant a Guardian, and take his Answer, &c.

[SOMETIMES the commission is to assign a guardian for an infant, and to take the infant's answer by his guardian, upon the oath of the guardian.] Oath of guardian.

[And the commission is sometimes to take the answer of another defendant at the same time.]

To assign a Guardian for one of non-sane Memory, by reason of Age.

[THIS is obtained as the other; and may be to answer, or plead, or both; or to answer, plead and demur; but not to demur only, for a demurrer may be put in without oath.] How obtained.

[The commission recites, the Court is informed, that, by reason of the party's age, he is of unsound memory, and commands, that if he is not well able to travel, they go to him; and by all ways and means by which they may be better informed of his condition, they carefully inspect and examine; and if he be Recital in the commission. [1 Px. Alm. 86. 162. 175.]

be of unsound memory, assign him a guardian, &c. And when they shall have so done, to certify the guardian's name, and inform the Court of all the facts, and of their proceedings in the premises.] The distinction between town and country cause seems not to affect this commission, it may be executed anywhere.

Hind. 251.

To take an Answer; or an Answer, Plea, and Demurrer.

How granted formerly.

[Wesl. P. 33.]

[THIS commission is granted upon supposal of the defendant's inability to travel, by reason of sickness, age, or infirmity: and therefore antiently was not granted, but upon oath of such inability or some other good cause.]

Now.

[Ord. Chan. 64.]

[But since business increased, it became a thing of course; and, if a defendant live twenty miles from *London*, he has of course a *dedimus potestatem* to take his answer.]

Tenor of the bill.

[Heretofore, the tenor of the bill was inclosed in or annexed to the *dedimus*; that the commissioners might (as the commission directed) examine the defendant thereon, and take his answer to it.]

[And therefore the plaintiff's commissioners might refuse to join in the execution of the commission, except they might read (or hear read at least) the answer in the defendant's presence; this institution was useful and good; but as the best things are often corrupted, so it happened with this.—For suits in equity increasing, commissioners of less quality, and often of no great probity, were made use of; the plaintiff's commissioners were willing to have as little trouble as might be for their fees; the defendant's solicitors got paper copies of the bill, and were willing to serve themselves by drawing the answer, and their clients too, by drawing it as artful and advantageous for them as their wit or skill, assisted by a counsel, could devise: so that at length it came to pass, the commissioners had nothing to do at their meeting, but ask the defendant, if he had read, or heard read, his answer

ſwer now before them; and, he anſwering in the affirmative, then to ſwear him, *that*, ſo much thereof as concerned his own act or deed was true; and ſo much as concerned the act of any other, he believed to be true: and ſo the buſineſs was diſpatched in an inſtant]

[The ſix clerks in Chancery, perceiving no uſe was made of the tenor of the bill, ſet young clerks to abridge the bill, ſo that at length it became a mere ballad, for which the clerk had, however, 8*d.* per ſheet; which, ſince bills grew to ſo great a length, amounted to a round ſum, through the office, in a year. This being obſerved to be a great and (as matters ſtood) a needleſs piece of expence, it was thought fit the ſubject ſhould be eaſed thereof: and ſo by the ſtatute 4 *Ann.* R. the tenor was taken away, and thereby the charge ceaſed.] Stat. 4 Ann.

[Some think, had the firſt deſign in ſending the tenor been made effectual, it might have ſaved much time and charge, by ſhortening ſuits, which are much protracted by evaſive and inſufficient anſwers: and they imagine this might probably have been effected by an order; that the tenor ſhould be duly made; and that a counſel in the country, not in the cauſe, ſhould always have been joined in the commiſſion, and of the *quorum*; and that the defendant ſhould have been examined before the commiſſioners upon the tenor, and the anſwer penned in their preſence, or ſome ſuch like method.]

[If you would have a ſpecial commiſſion to take an anſwer, plea, and demurrer, the Court muſt be moved] Special commiſſion.

[The Court will not grant a commiſſion to demur only, becauſe the defendant may do that under counſel's hand, without delivering the ſame in perſon, and without oath; which therefore he ought to have put in, in due time, and is not to be excuſed from by a commiſſion, to the needleſs charge as well as delay of the complainant.] To demur alone. [Or. Ch. 96.]

[Where a defendant made oath that he could not anſwer without ſight of writings in the country, and after that put in a demurrer only, an attachment was awarded againſt him.] Demurrer.

[A plea *indiſability to the perſon*, or *to the juriſdiction of the Court*, may and ought to be put in after the Plea.

 ſame

ſame manner as a demurrer. Wherefore, if the defendant ſhall pray a *dedimus*, and thereby return a demurrer only, or only ſuch a plea as ſhall be after over-ruled, he ſhall pay five marks coſts: and though the plea ſhall happen to be allowed, yet the defendant ſhall have no coſts, in reſpect of the plaintiff's needleſs trouble, occaſioned by ſuch commiſſion.]

[Or. Ch. 96.]

Defendant prayed time to anſwer, but put in a plea, which was held regular; but a demurrer after time to anſwer would not be ſo: ſo that there ſeems to be a diſtinction as to the kind of plea, in one caſe it is to be conſidered as a demurrer, in the other as an anſwer.

2 P. Will. 464.
2 Bro. 56.

Demurrer.
1 Vern. 282.

A demurrer allowed, but without coſts, becauſe it was a demurrer only, without any anſwer, and came in by commiſſion.

[Becauſe many times the defendant is not prepared to put in his plea or demurrer, or that there may be occaſion to plead or demur, or both, as well as to anſwer; he is forced to move the Court for a *dedimus* to anſwer, plead and demur; which the Court grants him] *upon his undertaking not to demur alone.*

[Said, the commiſſioners, upon an ordinary *dedimus*, have power to return nothing but an anſwer only; but if a plea or demurrer only be returned, it will be filed, as if it came in without commiſſion; but at the defendant's peril as aforeſaid.]

When returnable.

[A *dedimus* is ſometimes made returnable *ſine dilatione:* and if the returning it be delayed, it may be haſtened by motion.]

After contempt.
[Or. Ch. 99.]

[After a contempt duly proſecuted to an attachment, with proclamation returned, no *dedimus* is to go without motion, and *affidavit* of the party's inability to travel; or other good matter to ſatisfy the Court touching the delay.]

[Yet where the defendant was in contempt for not appearing, and took a commiſſion to anſwer, the Court would not quaſh it, nor force him to appear; but ſaid, if the commiſſion had not been gone, but about it, the Court would have ſtayed it until appearance.]

Time to anſwer.

[On oath made, that the defendant cannot anſwer without ſight of writings, evidences or goods, or without conference with ſome perſons twenty miles or more from *London*; the Court will on motion or petition,

tition, give him such time to answer as shall be thought necessary.] [Px. 8.]

The Court will of course allow two motions for time to answer, and a third upon terms. *Vide Answer.*

[Said, if defendant be within twenty miles and sick, a Master ought, in strictness, to go to him to take his answer: but the more common way is, it seems, if he be at any distance to take a *dedimus.*] Defendant sick.

[Said, when the defendant is minded to take a *dedimus*, commissioners may in strictness be struck, as upon a commission to examine: but said, the defendant's clerk does usually no more than call upon the plaintiff's clerk for two names, and put them into the commission with two of his own.] How commissioners are to be struck.

[As in commissions to examine witnesses, prove contempts, and other special commissions directed by the Court; so in a joint commission to take an answer, the commissioners agreed upon are to be entered in a book for that purpose, to be kept by the six clerk on the other side, that has the carriage of the commission, and subscribed unto by each six clerk in the cause, or in their absence by their respective deputies; so that no alteration may be made of the commissioners' names agreed upon, but by order: and the under-clerk shall not agree upon names after any other manner.] How their names are to be entered with six clerk. [Ord. Chan. 47, 48.]

[If the plaintiff refuses to strike names and join in commission, the Court upon motion will order him to join in four days, or some other short time; and on failure thereof, that the defendant have a commission *ex parte.*] Where plaintiff refuses to join in commission. Hind. 229.

[If one commissioner dies, the clerk must name two more anew; and one of them must be struck by the adverse clerk, and the Court must be moved for a new commission, with a new one added to the others living.] Death of a commissioner.

[There must be six days notice, exclusive of the day of executing the commission, given to the plaintiff, or some person named to that purpose, in the label of the *dedimus*, (generally the solicitor in the country,) of the time of executing. Notice of executing the commission. [1 Px. Alm. 8.]

[If notice be given on a *Sunday*, it may do to execute on *Saturday* after.] [Ibid.]

[No second commission is to be granted, without special order of Court, upon good reason to induce the same; or upon the plaintiff's own assent.] Second commission.

Negligence.

[If the party, who has the carriage of the commission, neglect to execute it, the Court will grant a new one to the adverse party, and give him the carriage of it.]

Attachment for not returning the commission.

[An attachment, and other process of contempt, which issued for not returning the commission and defendant's answer, was discharged, paying the ordinary fees; because one of the plaintiff's commissioners refused to join with one of the defendant's to take the answer: and a new commission was granted to indifferent commissioners, named by the defendant.]

[Ca. Rep. 113.]

Costs. Second commission.

[If by the fault of him, who has carriage of the first commission, the other is put to unnecessary charges, the Court will order the Master to tax him costs; and upon cause shewn, order the party in fault to give security to pay them before he have a second commission: and if he has the carriage of the second commission, to pay the costs upon it also, if he again fails.]

Costs.

[If the party, who has the carriage of the commission, gives notice of executing it, but does neither countermand notice in due time, as three or four days before the time, or as the distance of the place, *&c.* may require, nor execute it at the time; the Court on motion orders costs to be taxed for the adverse party's attendance.]

Answer sworn in the absence of plaintiff's commissioners.

[Notice being given of executing a commission, the plaintiff's commissioners attending at the place and day from nine till twelve, and from one to three, and the defendant's commissioners came not; and yet the answer was sworn the same day: the plaintiff moved therefore that the answer should be suppressed. The Court said his commissioners should have stayed till six o'clock.]

One commissioner on each side enough. Hind. 235.

One commissioner attending on each side is sufficient for the purpose of taking the defendant's answer, and returning the commission; but in case none of the plaintiff's commissioners attend, the defendant must have two commissioners to attend to take his answer, because no fewer than two can take the answer and return the *dedimus*.

How returned. Oath made that it has not been opened.

[When any commission executed is returned, it must be brought into Court, *i. e.* delivered to the six clerk, or his deputy, by some of the commissioners; else he that brings it must make oath before a Master, that

that he received it from the hands of some of the commissioners, and that by his procurement, or consent, or to his knowledge, it hath not since been opened or altered.] [West. P. sect. 34.] Hind. 237.

[Which seems a more reasonable way of swearing than what is said to be sometimes used, (*viz*) that he has neither opened it, or suffered it to be opened, *&c.* for the word [suffered] seems as well to extend to the opening it without his knowledge or consent, as with it: and it looks pretty hard to put a man upon swearing that that is not done, which possibly may without his privity and against his best care be done.]

Return.

[A *dedimus* ordinarily ought in strictness to be returned, *&c.* by the day after the first costs-day of the term next after the issuing thereof, save of *Trinity* term, and then by the second costs-day: but in regard country attornies generally come pretty late to town in the term, the clerk on the other side will stay some time, or the Court will, perhaps, on motion, enlarge the time. [Px. Alm. 8, 9.]

[No commission executed and returned is to be opened or copied till it be truly returned and delivered to the six clerk, out of whose office it issued, or to his deputy; and if it be a commission to examine, not until publication be duly passed in the cause.] [Or. Cha. 46.]

Peer.

[As a commission for the purposes aforesaid may be for a commoner, so may it be for a peer or peeress. For the execution of which, *vide* tit. *Answer*.] [Px. Alm. 68.] [Cl. Tut. 296.]

Corporation.

[So may it be for a corporation spiritual or temporal, or for a corporation and natural persons.] [Px. Alm. 86. 123.]

Lunatic.

[It may be also conditional, if the defendant be a lunatic, *&c.*] Px. Alm. 133.

How commissioners are appointed.

[The manner of appointing commissioners in such commissions as are herein before mentioned was (as I take it) heretofore the same as upon a commission to examine: but the examination on a commission to take an answer falling into disuse, and the business being only to see the defendant swear his answer, the clerk on each side name any two they please.]

Age of commissioner.

[Upon a motion to suppress an answer, because one of the commissioners that took it was an attorney's clerk under age, the Court said, if he be old enough to take an oath, he is old enough to be a commissioner to receive an answer. But *note*—This was since the exa-

examining the party on the tenor of the bill was disused.]

Answer signed by the party. 3 Atk. 4. 39.

Motion to suppress an answer, returned upon a commission out of the country, for want of being signed by the party, refused, the register cetifying that there were precedents to warrant such practice.

Dedimus lost.

[If by misfortune the *dedimus* be lost, the Court will grant a new one.]

Conduct of commissioners where defendant refuses the oath. [3Px. Alm. 55.]

[Said, if a defendant, having a commission to answer only, tenders a demurrer to the commissioners, and refuses to answer upon oath, they are to return such his refusal, and the reason thereof, together with the demurrer, and leave the same to the consideration of the Court.]

Commission abroad, how executed. Amb. 62.

A commission to take the answer of a person resident in a foreign country at war with us, must be executed in that very country; a commission to examine witnesses at the nearest neutral port.

Country cause.

A defendant in a country cause being entitled to a *dedimus* of course, he is seldom called upon to answer till the ensuing term, and then he generally applies for a *dedimus* to take his plea, answer, or demurrer, not demurring alone, (which is called a *special dedimus*,) and six weeks to return it, which is of course.

Hind. 229.

Return.

The *dedimus* is usually made returnable without delay, which if made out in term time, holds to the first return of the ensuing term; if in the vacation, to the last return of the subsequent term.

Hind. 229.

However, by the practice, a *dedimus* is not returned till the second return of *Hilary* and *Trinity* terms, because the vacations between *Hilary* and *Michaelmas* and between *Easter* and *Trinity* are so short.

Mos. 176. Hind. 230.

Ordinary dedimus. Hind. 229.

An ordinary *dedimus*, by which an answer or plea can order be taken, is made out by the six clerks, without returnable without delay, or on a day certain in term.

Return.

In the two shorter terms, when the defendant lives a great distance from town, he must have a commission with a longer return than when he lives nearer town. The proceedings however are adapted to the convenience of both parties, and the time to be allowed the defendant is settled by the clerks in court on both sides.

Return.

Hind. 229.

Answer, how taken and sworn by commissioners.

The answer being prepared, the commissioners meet on the day appointed, and the defendant accompanied by his solicitor attends with his answer. One of the defendant's

defendant's commissioners opens the commission and interrogates the defendant, whether he has heard his answer read, and exhibits it as his answer to the bill of complaint of ——— Hind. 235.

One of the commissioners administers the oath to the defendant, laying his right hand on the *Bible*, or *New Testament*.

"You shall swear, that what is contained in this your answer, as far as concerns your own act and deed, is true of your own knowledge, and that what relates to the act and deed of any other person or persons you believe to be true. So help you God!" Oath.

The defendant must sign his answer in the presence of the commissioners. 2 Atk. 290.

The commissioners should be precise in the caption of the answer. The joint and several answers of two defendants was on motion suppressed for irregularity, because it was underwritten *sworn* only, and not both sworn. For the form of the caption and of the oath, *see Hind.* 235. Caption. Mos. 238.

If there be schedules, they are all to be annexed to the commission. Schedules.

COMMISSION TO EXAMINE.

[THIS is either to examine the parties, or witnesses, or others, as contemnors, *&c.*

[A commission to examine witnesses is sometimes to examine them to the cause, or to some particular point in question; sometimes to a contempt.] What.

[Examination to the cause is sometimes before hearing, sometimes it is after; as upon an account referred to a Master, or upon new matter stated at the hearing.] Before hearing.

[Other times it is to examine witnesses beyond the sea; and then if they be foreigners, to examine them on their oaths, and the oaths of skilful interpreters. And in such case, when it is apprehended the returning it by a commissioner, or some that may make oath of the true keeping it, will be too much delay, the Court will sometimes order, that a commission be delivered to a Master to send by the post; and that here ceive it back by the post when executed.] Abroad. [2 Ch. Ca. 76.]

[Sometimes it is also to examine witnesses *in perpetuam rei memoriam.*]

To examine Witnesses.

Account.

[THOUGH a cause be only matter of account, which may be, and ordinarily is, examined to after hearing; yet where a defendant desired a commission before hearing, the Court granted it, as being what he had a right to.]

Rejoinder.

[Before this commission issue, the plaintiff is ordinarily to reply, and to serve the defendant with a *subpœnâ* to rejoin, and upon the return thereof give an eight-days rule to rejoin; which the defendant having done, or the eight days being expired, the complainant may give two ordinary return-days for the defendant to produce his witnesses, and then a peremptory day; before which if the defendant comes in, he may join in commission with the plaintiff; or if the plaintiff think not fit to join in commission, the defendant may of course, upon petition or motion, have one *ex parte.*]

[Toth. 20.]

Not always granted, till the cause is at issue.

[Though this commission to examine is not ordinarily to be granted till the cause be at issue; yet if a witness be very aged or sick, the Court will sometimes order it even before answer.]

Subpœna to rejoin.

[Ch. Cases, 15]

[If the defendant rejoin *gratis*, or the parties go to commission by consent, there needs no *subpœnâ* to rejoin.]

Bill and answer. Hearing.

[If the plaintiff be minded to go to hearing on bill and answer, then he neither replies, nor takes a commission.]

Who to have the carriage of it.

[2 Pr. Alm. 17.]

[The plaintiff is ordinarily to have the first taking out and carriage of the commission to examine.]

[But if the defendant has witnesses which live beyond the seas, where the plaintiff has none, it should seem otherwise; for in such case he shall have a commission granted him for examining his witnesses only.]

[And so he shall, if his witnesses here live a long way off the plaintiff's, as 60 or 80 miles.]

[So if when the cause is at issue, the plaintiff will not go on to commission, the defendant may have a commission to examine his own witnesses, and shall have the carriage thereof.]

[Toth. 16.]

[So perhaps, if the plaintiff commit any gross abuse in the execution of the first commission, the defendant shall have the carriage of the second.]

[The

[The ancient way of naming commissioners, it seems, was this: the plaintiff's clerk first named one, to which the defendant might give general exceptions; the defendant named the second, the complainant the third, and the defendant the fourth.] How commissioners named.

[But now, when a party is intitled, and minded to take out a commission to examine, his clerk or deputy calls upon the other parties for four commissioners' names, which being given him in time, he gives the other four: and after each clerk has consulted his client, or the solicitor, he strikes out two of the four delivered by the other. First, he that has the carriage of the commission strikes out one of them named by the other, then the other strikes out one of his, and so each one more; and the four remaining are the commissioners.] [Com. Sol. 29.]

[The common exceptions to commissioners are these:] Exceptions to commissioners.

[That he is of kindred, allied to the party for whom he is named.]

[That he is master to the party, his landlord, or partner.]

[That he hath a suit in law with the party adverse to him for whom the Commissioner is named; or is of Council, or is attorney, or solicitor, or follower of the cause on one side.]

[That the party is indebted to him; or any other apparent cause of partiality or siding with either party.] [Toth. 20, 21.]

[Heretofore it was commonly used, that either party might give exceptions to one, and they seldom gave exceptions to more.] [Toth. 21.]

[If the adverse party does not give or strike names in time, he who is to have the carriage of the commission may by order, upon motion, name all the four, and have a commission *ex parte*.] Commissions ex parte.

[Where a commission is granted *ex parte*, there needs no notice to the other side of the execution thereof.] [3 Pr. Alm 61.]

[Said, after a *subpœnâ* to rejoin served, and commissioners names called for in term of the defendant's clerk, who refuses or delays joining in commission till the second seal after term, the complainant's clerk may make a commission *ex parte*.]

[By the ancient orders and course of the Court, the commission was not to be granted but for age, impotence, or remote distance of place.] When granted. [Or. Ch. 9.]

[But

[But now the order is only, that no commiſſion to examine witneſſes ſhall be executed in or near *London*, nor within ten miles thereof, without a ſpecial order, to be obtained upon affidavit of the party's inability to travel, or other good matter; and all depoſitions taken contrary hereto ſhall be ſuperſeded and ſuppreſſed *ipſo facto*, and not allowed to be read as evidence at hearing; and the parties who cauſed the ſame to be executed are to ſuffer ſuch puniſhment for their contempt and irregularity as the Court ſhall think fit.]

[Or. Ch. 109. Px. Alm. 17.]

Depoſitions ſuppreſſed.

[It is irregular for the clerk of the ſolicitor in the cauſe to write as clerk in the execution of the commiſſion; and the Court has in ſuch caſe ſuppreſſed the depoſitions.]

[2 Ch. Rep. 393.]

Irregularity.

[Said, a commiſſion to examine cannot be diſcharged upon a petition without reference and a certificate (of irregularity).]

[Cl. Tut. 30.]

Commiſſion renewed in what caſe.

[If by default of him that has the carriage of the commiſſion, or his commiſſioners, nothing is done thereon, he ſhall bear the charges the other ſide was put to about it, either for fees of court, bringing or retaining commiſſioners or witneſſes, or otherwiſe, to be aſcertained by the oath of the party, or him that diſburſed the money for him, and ſhall renew the commiſſion at his own charge.]

[Or. Ch. 108.]

What notice of executing the commiſſion.

[He who has the carriage of the commiſſion, or his commiſſioners, muſt either in perſon, or by note left in writing at the place of the uſual abode of the party, or his ſolicitor, or ſome other perſon mentioned in the label of the commiſſion, give 14 days notice of the time and place of executing the commiſſion. It is ordinarily done by note under the hands of two of the commiſſioners to ſome perſon mentioned in the labels to that purpoſe.]

[Com. Sol 29.]

[If notice be not given of executing the commiſſion, the Court will ſuppreſs the examinations, and grant the other a new commiſſion.]

[Com. Sol. 30. Px. Alm. 8.]

[Said, if notice be given of executing the commiſſion, and at the day appointed the commiſſion is opened, and nothing done thereupon, and no adjournment made, the commiſſion is loſt, except the other ſide agree to adjourn or take new notice. But if the commiſſion be not opened, and he who has the carriage thereof gives new notice and then executes it, this is a ſufficient execution, unleſs in the meanwhile the other ſide had obtained and ſerved an order to ſtay proceedings till

till the costs of the former day be paid, and that they are not paid.]

[Where only one commissioner on each side met, the plaintiff's commissioner went away without doing any thing, and so the commission was lost; the Court ordered the plaintiff to pay the defendant his costs, and that there be a new commission, and the defendant to have the carriage of it.] Commission renewed.

[Due notice being given, if the one side produces and examines all his witnesses, and the other side does not, but prays a new commission; if it be granted, he that prays it shall bear all the charges of such renewed commission both in court and in the country, and as well for the charge and entertainment of the other's commissioners as his own; and the other side shall be permitted to cross-examine the witnesses produced by him that renews the commission. But if the other side will examine any other witnesses of his own, then he shall bear his own part of the charge. The charges above-mentioned to be ascertained by the oath of the party, or of him who disbursed the money for him.] Notice. New commission. [Or. Ch. 108. Px. Alm. 17. 18.]

[Where a commission lost by the fault of him who had the carriage of it, is renewed, the other side commonly hath the carriage of it.] Commission lost.

[Said, if the commission become void by error of the clerk in making it, the costs shall be borne by him, and that side for whom it was taken out, and who had the carriage of it.] [3 Px. Alm. 62.] Error. Costs.

[If commissioners on both sides attend the execution of a commission, and one side examines, and the other neither examines nor puts in interrogatories, he shall never do it afterwards without order of Court on good cause shewn.] [Com. Sol. 30.] If one side does not examine.

[So where the defendant joins in commission, &c. though his commissioners do not attend.] [Com. Sol. 30. 1 Ch. Ca. 274.]

[But if affidavit be made of some reasonable cause of non-attendance, and that neither the party (who did not examine) nor any for him, or by his direction or knowledge, has seen, heard, or been informed of the depositions taken, or any part of them, nor willingly will see, &c. till he has examined, or till publication, the Court will grant him a commission to examine.]

[And so upon an examination in court before the examiner; and the Court in such cases will order publication to stay some time.]

[He, at whose instance a commission is renewed after a former commission executed and returned, and he by the Renewed commission.

the default of whom or of whose commissioners a former commission was not executed, and is thereupon renewed, shall at his peril examine all his witnesses on that renewed commission, or shall examine them in court by the end of the term it is returnable, without any more or further delay.]

[Or. Ch. 109. Px. Alm. 18]

Publication.

[Where publication is past, no commission to examine can be granted or renewed without special order.]

[Com. Sol. 3.]

Subpœna.

[Heretofore *subpœnâs* were frequently granted for witnesses to appear and testify before the commissioners.]

[Cary Rep. 215.]

Summons.

[But the general course now is, the commissioners by note or summons under two or more of their hands call the witnesses before them. But I think no attachment lies against the witnesses for not appearing thereon, seeing no writ is directed to them, nor the great seal shewn them.]

[Where a witness refused to be examined before commissioners, the Court upon motion granted a *subpœnâ* for him to be examined in court, at his own costs; and, it seems, is the method still taken with them, if they refuse to appear or be examined.]

[Cl. Tut. 9.]

[Where the witnesses are duly served, *&c.* (and are able) but do not appear, a new commission may be had upon oath thereof.]

[1 Px. Alm. 19. Com. Sol. 30.]

Witness may refuse, till charges paid.

[Said the witnesses may refuse to appear or be examined till their reasonable charges be paid them for their pains, loss of time, and expences.]

[Com. Sol. 30.]

Interrogatories.

[Each side ought to exhibit interrogatories: and said, the Court dislikes the commissioners examining the defendant's on the plaintiff's interrogatories; or *è contra.*]

[Cl. Tut. 15.]

Witnesses how to be examined.

[The commissioners must themselves examine witnesses, and not leave so weighty an affair to their clerks or others.]

[Com. Sol. 31.]

[They ought to examine them but to one interrogatory at a time, and not read another to them till they have answered the former.]

[Ibid.]

[They are to hold the witnesses to the point interrogated.]

[Ibid.]

[They are to take what comes from them in answer to what they are examined, and not upon their sight and reading all the interrogatories to let them set it down themselves. But after they have been examined, they may suffer them upon better thoughts to amend their examination (which is not to be suffered on an examination in Court).]

[Com. Sol 31. Px. Alm. 21.]

[A wit-

[A witness may bring short notes along with him to help his memory, but not the substance of his depositions, nor may he transcribe such notes *verbatim*.] Witness.

[The commissioners ought not to ask idle questions, besides the matter of the interrogatories, nor set down impertinent answers; but all material answers truly.] Commissioners conduct. [Com. Sol. 31.]

[One commissioner may be examined as a witness by the other commissioners, so he be examined before any witness hath been examined in his presence, *&c.* but otherwise his depositions will be suppressed, because he heard or saw the other's deposition.] Commissioners. Witness. [2 Cl. Tut. 29]

[It is usual when an adjournment is made, to make a *memorandum* thereof, which the commissioners sign.] Adjournment.

[A special commission was granted to examine the quantity and value of certain ore, *&c.* The six clerks appointed time and place. *PerCur.*—The time and place is only for the first meeting of the commissioners; but after they may adjourn to another time, or another place.] [1 Ch. Ca. 282.]

[If a commission be adjourned to another day and place, and witnesses are examined, the time and place where such examinations were taken ought to be mentioned and set down in the title of the respective depositions; because in an indictment of perjury the place must be mentioned, and I suppose proved.] Adjournment.

[The examinations are to be ingrossed in parchment, and the commissioners are to set their hands, to every sheet and schedule, and to a certificate on the back of the commission, that the execution thereof is contained in a schedule or schedules thereto annexed; and the whole is to be closed up, and sealed with the commissioners' seals, and to be delivered to a Master by one of them, or to be sent up to the Court by one who must make oath, as on the delivery of an answer.] Examinations, how delivered to the master. [Pr. Alm. 19.]

[Being so delivered, the examinations are not to be opened or copied till publication be duly passed.] How kept.

[If the commissioners cannot agree, or meet with any obstruction in executing the commission, that, or what else is necessary to inform the Court of, must be certified by the commissioners in the return of the commission.] Irregularities certified

[Where commissioners of one side certified irregularity, and both or one of the other side made affidavit, the Court ordered the commissioner on the other side to make affidavit too: for the Court in such case and verified by affidavit.

will order what shall be thought necessary for discovery of the truth of the fact.]

[Px. Alm. 19.]

Examiner sent down.

[Where there is a disagreement of the commissioners in the execution of the commission; or where there is any other special cause that obstructs the execution of it; the Court will send down an examiner into the country.]

[Com. Att. 433. Toth.---39.]

[The Court will sometimes order commissioners touching partiality and practice.]

[Toth. 40.]

Commission to examine irregularities.

[Exhibits of writings were alleged to have been altered and interlined since the commission to examine witnesses executed: the Court granted a commission to examine this matter.]

[1 Ch. Cases, 273.]

Affidavit thereof to be made.

[Where commissioners on one side certified partiality in the other; the Court seemed unwilling to take any notice of it; saying, let them certify the matter committed to their charge. And if there be misdemeanor, let the party wronged make affidavit thereof, &c.]

[Cary Rep. 43.]

Irregularity certified.

[A joint commission issued to examine on both parts, directed to three, four, or two commissioners, three met and examined witnesses, and appointed a new day to examine more: the defendant's commissioners took up the commission, carried it away, and came not at the day appointed. The plaintiff's commissioners came and examined witnesses, without having the commission; and certify these with the former depositions taken, and the whole matter.]

Subpœnâ duces tecum to commissioners.

[The Court ordered the depositions certified to be sealed up again, and remain here: and awarded a *subpœnâ duces tecum* against the commissioners, to bring in the commission, and thereupon the Court would take further order.]

[Prac. H. Ch. 115.]

Reflecting words.

A witness examined at a commission, swears reflecting words; yet he ought not to pay costs: it being the commissioners' fault to take down such depositions.

2 P. W. 406.

Abatement.

A commission being granted to examine witnesses at *Algiers*, the plaintiff died; by which in strictness, the suit abated: but as the witnesses were examined there before notice of the plaintiff's death, the examination was held regular. And it was said, that in a case where witnesses had been examined on a commission after the demise of the crown, but before notice thereof, it had been held, that they were liable to be indicted for perjury, if they swore false.

3 P. W. 195.

After

After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses, in order to falsify the defendant's examination. Publication. 3 P. W. 413.

If a commission be taken out in vacation and has not a certain return, but only *sine dilatione*, it does not expire the first day of the following term, but may be continued in execution the whole of the next term, to the last return. 2 Vern. 197. 3 Atk. 593.

After depositions under a former commission have been seen, the Court will not suffer additional interrogatories to be exhibited under a new one, but confined defendant to the proving exhibits, and cross examining a person already examined for the plaintiff, but not to examine any new witnesses. Depositions. 3 Atk. 594.

Plaintiff may serve any two of the defendant's commissioners with notice of the execution of the commission, and is not tied down to those only which the defendant should choose; for if it were so, and either of them should be dead, or they should be absent from the place appointed for the execution of the commission, it could not be executed; and therefore the Court lets four commissioners stand to guard against such accidents. Notice. Service. 3 Atk. 633.

A commission to examine witnesses in a foreign country at war with *England*, may be executed at the nearest neutral port. Execution. where. Amb. 62.

Upon an application for a commission to examine witnesses abroad, to shew that legacies given by two codicils were both intended for the legatee, the legatee ought to swear she believes that to be the testator's intention. To examine abroad. 1 Bro. 449.

However, it was afterwards determined, upon motion for a commission, to examine particular witnesses abroad, that in order to obtain it, it is sufficient to state by affidavit their names, that their evidence is material, and that they are abroad. On motion for a commission to examine witnesses abroad, it ought to be stated in the affidavit that the matter arose abroad, or sufficient read from the answer to shew it. 4 Bro. 89. 2 Bro. 273.

When a commission is executed abroad, the person who takes out and returns it must make an affidavit that he received it from the commissioners. How returned. 4 Bro. 100.

After a decree, the Master may examine witnesses, but ought not to do so by his clerk. The same *subpœnâ* issues After decree. Subpœnâ.

issues as to bring them before the examiner, which is the same as a *subpœnâ* to answer; but the label expresses the purpose. Upon an examination in the country, the body of the writ expresses that it is to testify.

3 Ves. jun. 603.

Commission after a decree.

Decrees in the Exchequer always express, that the Master be armed with a commission to examine witnesses, and power to direct the same to the country; it was so formerly in Chancery. After a decree, however, if the Master sees cause for a commission to examine witnesses in the country, he certifies that it is necessary, and the Court upon motion grants it.

3 Ves. jun. 607.

Depositions filed.

The depositions, when returned, are filed by the six clerks; but those taken before the Masters are kept in their office.

Duplicate of the commission.

In some cases the Court will indulge the defendant with an order for a duplicate of the commission, especially if it be doubtful whether the plaintiff will execute his commission or not; and if he be forced on by the defendant, as in an injunction cause, and where the plaintiff who has the carriage of the commission, refuses to give notice of the execution.

Hind. 303.

Commissioners.

Commissioners ought to be indifferent persons; and after commissioners are struck, if it be discovered that one of the commissioners is nearly allied, of council, solicitor, or partner with the plaintiff or defendant, or any cause of partiality can be shewn, the Court on motion or petition will order the party to name commissioners *de novo*, in the place of him complained of, or that the commission issue *ex parte*.

Hind. 304.

Form of commissions abroad.

A commission to examine witnesses beyond sea, in a foreign language, differs in point of form from the ordinary commission to examine generally. For the form of the commission, *vide* Hind. 309.

Hind. 308.

COMMISSION TO EXAMINE IN PERPETUAM REI MEMORIAM.

VIDE

Bill.

[IF the defendant does not shew cause against a commission, and yet will not join, the plaintiff may, on motion, have a commission *ex parte*, and go alone.] [Px Alm. 434.] Ex parte.

[Said, the complainant may have this commission on filing the bill, even before a *subpœna*; but that I suppose is only *de bene esse*.] Vide *Witnesses, Examination*. Before subpœna.

A COMMISSION OF REBELLION.

[THIS process issues after a *non est inventus*, returned upon an attachment, with proclamations.] Issues when.

[It is usually directed to such commissioners as the plaintiff names, which are commonly four, and one or two of them bailiffs, sometimes it is directed to the sheriff.] How directed.

[Said, the commissioners may break open his house to take the party, or even the house of another where he is.] Power of commissioners. [2 Px. Alm. 75.]

[If he be taken in or near *London*, in term, or the time of public seals, they are to bring him to the Fleet.] Fleet prison.

[But if the party be taken in the country, the commissioners may, at their election, either bring him to court without delay, or take bond with good security to the Master of the Rolls in 100 *l.* penalty, with condition for his appearance, *&c.*] Security for appearance.

[But if the return be of any long distance, *&c.* and the party offers good bail, the commissioners ought to take it, (though after decree,) and not keep the party who has offered bail, lingering in prison in their houses.] Bail. [2 Ch Rep. 262.]

[If the commissioners refuse to return the writ, the Court on motion or petition will order them to return it; which order, if upon service they do not yield obedience to, process of contempt may issue against them.] Return of the writ.

Escape.

[Where private persons are made commissioners, if they take any of the parties and suffer an escape, the Court on affidavit and motion, and day given to shew cause to the contrary, will order them to be committed till they bring him in, or pay the debt, *&c.*]

Com. Sol. 31. Toth. 38, 39.

Rescue.

[So if any rescue him, the rescuer will be ordered to stand committed, *&c.*]

Wife taken without the husband.

[A wife was taken upon this process and carried bound to prison and kept very close, the husband not being taken; the Court ordered that she should be discharged and costs paid her, as well in respect of the bringing her in without her husband, as her being so hardly dealt with.]

H. C. 171.

Non est inventus.

[Upon a return of *non est inventus* by the commissioners, or any two of them, the Court will, on motion, order the party to stand committed, and to that purpose the Lord Keeper grants his warrant to the serjeant at arms.]

To whom directed.

[A commission of rebellion is a writ issuing out of and under the seal of the Court, directed sometimes to the sheriff, but generally to commissioners jointly and severally commanding them "to attach or cause to be attached (*the defendant*), wheresoever he shall be found within the kingdom of *Great Britain*, as a rebel and contemnor of our laws, *&c*" and is usually directed to such commissioners as the plaintiff appoints, commonly four in number.]

Hind. 116.

How executed.

Upon this writ, the party may be taken upon a *Sunday*, or in any privileged place; the commissioners may break open houses to take him; but in such case, it is advisable for them to have a peace-officer with them.

Hind. 116.

It may be executed on a *Sunday*, though it issued for want of an appearance, or even for want of an answer only.

1 Atk. 57.

By the course of the Court, a commission of rebellion issues only to the sheriff of *Middlesex*.

2 P. W. 657. In notis.

A party taken upon this process cannot be bailed by a justice of the peace.

Hind. 117.

If the process be in execution, as for a contempt of an order of the Court, whereby costs are adjudged to be paid, on non-performance of a decree, the commissioners ought not to bail the party, but should keep him in custody and bring him into court on the day of the return; and on motion, he will be turned over

to

to the Fleet prison till he performs the duty, and pays the costs of his contempt, which are 50 *s.* and 6 *s.* 8 *d.* to each commissioner, who makes a return to the commission. Hind. 117. Bunb. 50.

But commissioners of rebellion, where it is upon the ordinary process, not only may, but ought to take a bond as a security for the defendant to appear. Bunb. 50.

If the defendant be taken upon a commission of rebellion which issued irregularly, the defendant shall have costs. Costs. 1 Vern. 269.

If an action at law be brought for an assault and battery, or false imprisonment, in executing a commission of rebellion, an injunction will be granted: because the irregularity can only be examined in this court. Irregularity. 1 Vern. 269.

If an escape be with the consent of the commissioners they will be committed till they pay the debt. Escape. Hind. 118.

Though a commission of rebellion may be executed on a *Sunday*, yet the Chancellor said, that he should much disapprove such an execution of it, unless in cases of absolute necessity, and if executed in church, would punish the commissioners, and that they would have been punishable at law. When executed. M. S. 13 June 1797.

COMMISSION TO EXAMINE PARTIES.

This is either upon a Contempt,

(Vide *Examination, Contempt,*)

or,—to a Cause.

[And this either before or after hearing. Vide *Examination, Parties.*]

[*Commission to examine Strangers to the Cause:* As, Contemnors, Workmen, &c.]

[There are several other Commissions, as the matter requires; as touching Lands and Buildings.] [1 Px. Alm. 92]

[——— To distinguish lands.] [Ibid. 110.]

[——— To divide them. 3 *Atk.* 83.]

[1 Px. Alm. 230.] [——— To divide by consent.]

[Ibid. 97.] [——— To divide and give possession.]

[Ibid. 111.] [——— To separate lands by oath of witnesses.]

[1 Px. Alm. 174.] [——— To view and certify incroachments in buildings.]

[1 Px. Alm. 166.] [——— To the sheriff to deliver possession of lands, *post decree*.]

[Cl. Tut. Ch. 316.] [——— To survey and examine the metes and bounds of lands; and to assign the bounds, and determine the matter if they can; and to certify the Court what they do.]

[Cl. Tut.]

[1 Px. Alm. 98.] [——— Of assistance, which pursues an injunction, and is much of the same nature.]

[1 Px. Alm. 61. Cl. Tut. 383.] [——— To raise the *posse comitatus* and deliver possession, and bring those found on the land to prison.]

Touching other matters; as,

[1 Px. Alm. 115.] [——— To fell timber, and thereby levy a sum of money pursuant to an order of Court.]

[Cl. Tut. Ch. 106.] [——— To fell trees sufficient to repair houses, according to an order of Court.]

[1 Px. Alm. 177.] [——— To take an infant out of his guardian's hands he first sued by, who refuses to deliver him on the order of the Court, and to deliver him to one appointed by the Court.]

[Cl. Tut. 317. 1 Px. Alm. 28.] [——— To amend mistakes in the engrossment of depositions.]

[1 Px. Alm. 134.] [——— To receive writings of the defendant, which he hath confessed in his answer.]

[Cl. Tut. 281. 324. 327. 359. 1 Px. Alm. 86.] [——— To hear and determine all matters in controversy depending in this court, between the plaintiff and defendant.]

[Cl. Tut. 366.] [——— To take the defendant's answer, examine witnesses, and to hear and determine the matter.]

[West. P. Sect. 36.] [——— To examine whether a defendant was not able to travel here to court at the return of a process, as was sworn *per* affidavit.]

[1 Px. Alm. 138.] [——— To examine sequestrators touching the profits. Vide *Sequestration*.]

COMPTROLLER OF THE HAMPER.

[HE attends daily on the Lord Keeper in term time, and on ſeal days out of term.]

[His office is to receive all writs, and whatever paſſes the great ſeal, from the clerk of the Hamper, ſealed up in bags; and to open the bags, and take an account of the number, nature, and kinds of what he ſo receives, and enter the ſame in a book, whereby to charge the clerk of the Hamper.]

CONTEMPTS AND COMMITMENT.

VIDE

Proceſs of Contempt.
Subpœnâ.
Attachment cum Proclamatione.
Interrogatories.
Demurrer, Infant.
Decree and Coſts.

[A Contempt is a diſobedience to the Court, or an oppoſing or deſpiſing the authority, juſtice, or dignity thereof.] What.

[It commonly conſiſts in a party's doing otherwiſe than he is enjoined to do; or not doing what he is commanded or required by the proceſs, order, or decree of the Court.]

[Sometimes it ariſes by one or more, their oppoſing or diſturbing the execution or ſervice of the proceſs of the Court, or uſing force to the party that ſerves it.] [Toth. 33.]

[Sometimes by uſing words importing ſcorn, reproach, or diminution of the Court, its proceſs, orders, officers, or miniſters, upon executing or ſerving ſuch proceſs or orders.]

[It is alſo a contempt to abuſe the proceſs of the Court by wilfully doing any wrong in executing it, or

making use of it as a handle to do wrong; or to do any thing under colour or pretence of process, or authority of this Court, without such process or authority:]

2 Ak. 471. *abusing parties or prejudicing mankind before the cause is heard.*

[Toth. 41.] [It is a great contempt to terrify a witness that is to be examined.]

[It is an exceeding high contempt to forge or counterfeit the process or seal of the Court. Vide *Subpœnâ.*]

How punished. [For any direct and positive contempt, a party may not only be taken into custody, but committed to the

[West. Sect. 32.] Fleet during the pleasure of the Court.]

[But for a bare contempt in not doing somewhat,

[Ibid.] then only till he obey and perform; for,]

[A contempt in doing somewhat against the order of the Court is accounted much greater than omitting to do somewhat commanded; seeing the one is wilful, the other not always so. And besides, what is only not done, may be done: but what is once done, cannot be undone; though its effects may often be made to cease, or reparation may be made.]

Irregularity process. [Though a process be irregularly issued, it may be a

[Cl. Tut. 12.] contempt to disobey it.]

Contempt discharged. [Where a man is imprisoned upon mere contempts past, he may be discharged, *ex gratiâ*, after sufficient imprisonment, or he may be otherwise dispensed withal. But where it is for non-performance of any order of Court, still in force, between parties, the contemptor is not to be discharged till he has yielded obedience; but the Court may dispense with the performance of the

[Com. Sol. 21.] order for a time.]

Bond to appear. [Such as are brought in upon process of contempt, must (if they will have their liberty) enter into bond to appear *de die in diem*, and not to depart without leave

[Com. Sol. 37.] of the Court; else they will be committed to the Fleet.]

[Prac. H. Ch. 371.] [Where a defendant was taken or brought in upon a commission of rebellion, he was forthwith committed;

Process. because he had sat out all the ordinary process of contempt.]

[For the contempt of not appearing upon a *subpœnâ ad respondendum*: or having appeared, for not answering; there goes an attachment of course. Then, upon *non est*

est inventus returned to it, an attachment and proclamation. On the like return of this, a commission of rebellion. Upon the like return to this, the Lord Keeper grants an order for his warrant to the serjeant at arms, to take the defendant, *&c.* Upon his *non est inventus*, the Court grants a sequestration.]

[*Note*; If the defendant has appeared, and is in contempt for not answering, then upon a *non est inventus* returned by a serjeant at arms, or a *nihil* returned on the sequestration, or the defendant's continuing obstinate in his contempt, the Court will order the cause to be set down for hearing, and will take the bill, *pro confesso* and decree for the complainant according to the prayer of the bill.] Bill taken pro confesso. [2 Ch. Rep. 284]

[If in such case the plaintiff by his bill prays an injunction to quiet a possession, or to stay the defendant's proceedings at law, the Court will grant him a perpetual injunction.] Injunction.

[Where the defendant is *subpœnâ'd* to make a better answer, and he appears not thereto, but stands out all contempts, such process and proceedings are used as upon the first *subpœnâ* to answer. Vide *Subpœnâ*.] Answer.

[As to contempts against an order, the party must commonly be served with the order under seal, ere he can be brought into contempt for not obeying it.] Contempts against an order.

[But if the party was actually present in court when the order was pronounced; or if he be a servant or minister of the court, upon whom the order is made, as a solicitor, *&c.* it may be otherwise. And if the fact be against a standing order of the Court, there needs no notice of it.] Party present notice. 3 Atk. 567.

[If it be proved that the order under seal left with a servant, *&c.* came to the party's hand, it may be sufficient foundation for a contempt. Vide *Money*, and *Writ of Execution of a Decree*.] Notice. Cl. Tut. 2.

[For contempts against an order; *first*, an attachment goes forth, upon an affidavit of the contempt. Then the party being taken (if he deny the contempt) is to be examined touching the contempt, upon interrogatories, which are commonly upon motion referred to a Master to settle, and to examine him upon; otherwise he is to be examined by one of the examinors of the Court.] Contempts against an order. [Com. Sol. 21. Com. Att. 439.]

[If upon examination he deny the contempt, the adverse party may upon motion and order examine witnesses to prove it. *Vide infra.*]

[Toth. 33.]

Appearance gratis.

[Said, the contemptor coming in *gratis*, or upon process, is to give notice to the clerk on the other side of his appearance: and if there be no interrogatories put in before an examinor, within eight days after notice, or the party being examined; if no reference to a Master be obtained by motion or order to certify whether the contempt be proved or not; nor a commission taken out by the party prosecuting, to prove it; nor any witnesses examined within a month to prove, the contempt. The contemptor may be discharged and have his costs taxed by a Master without motion.]

[Com. Sol. 21.]

Departure after appearance.

[If after appearance on process of contempt, and interrogatories exhibited, the party without leave of the Court depart before he be examined; then upon motion and certificate from the register of such his departure, and of the interrogatories exhibited from the examinor, he is to stand committed without further day given him; and is not to be discharged from such his contempt, till he hath been examined and cleared of his contempt.] And,

Costs.

[Though he be cleared of his contempt, yet he shall have no costs, because of his disobedience in not being examined, without the prosecutor's charge and trouble in moving the Court for his commitment.] And,

Discharge.

[If upon his examination, or by proofs, he be found in contempt, he shall clear his contempt and pay the prosecutor his costs, before he be discharged of his imprisonment.]

[Or. Cha. 113, 114.]

Interrogatories.

[The Court on motion will hasten the filing interrogatories on a contempt A party in custody on process of contempt appeared and prayed to be examined; the Court ordered interrogatories to be filed in four days, or the party to be discharged.]

Commission.

[When a party prosecuted on a contempt has denied it, or it does not clearly appear by his examinations, the prosecutor may take out a commission of course, to prove the contempt. And in such case the party prosecuted may name one commissioner to be present at the execution of the commission; and may cross examine the witnesses produced against him to prove the contempt; but is not to examine any witnesses on his part, unless he shall satisfy the Court touching some matter

matter of fact necessary to be proved for clearing the truth; and then he is to examine them only to such particular points set down, and the other may also examine them; and the interrogatories on both sides are to be included in the commission.] [Or. Ch. 114.]

Proof.

[Where, upon a *subpœnâ ad respondendum*, the party upon his examination sweareth he was not served. If upon a commission to examine to the contempt for not appearing, the party that served the *subpœnâ* (so that it be not the plaintiff himself) depose that he personally served the defendant himself: this is sufficient proof.] [Cl. Tut. 3.]

[So, where an affidavit of service of an injunction is made, and the party in contempt doth on his examination deny the service; if, on a commission to prove it, one witness swears the service: that, with the affidavit, is sufficient proof of the contempt.] [Cl. Tut. 6.]

[But, to prove a contempt in not obeying a decree, said, there must be two direct witnesses.] Ibid.

[Upon an ordinary contempt, a commission was had by the plaintiff, who proved the contempt positively by one witness. The defendant alleged the process was by mistake served on a wrong person, and prayed a commission to examine to it; and it was granted.] [2 Ch. Cases, 100.]

Commission.

[Where a contempt is prosecuted against one, who, by reason of age, sickness, or other cause, is not able to travel; or against many persons who are servants or workmen that live far off, the Court will, on motion and affidavit thereof, grant a commission to examine them in the country, which shall be sued out and executed at the charge of the person desiring it, directed to such indifferent persons as the prosecutors of the commission shall name (as in other cases); and one commissioner only at the nomination of the party prosecuted, as aforesaid. Which commission must be executed in such convenient time and place as the six clerks (not towards the cause) upon hearing the clerks on both sides shall set down.] [Or. Ch. 115.]

Master's report, costs.

[Upon any examination of a contempt referred to a Master to certify whether the contempt be confessed, or proved, or not; the Master in his certificate or report shall likewise assess and certify the costs to either party, as there shall be cause; without order or motion for that purpose.] [Or. Ch. 115.]

Commitment.

[A party brought up in custody upon process of contempt, or that having entered his appearance with the register,

regiſter, doth upon examination confeſs the contempt, or hath it proved upon him, will be committed on motion.].

[Toth. 33.]

[Where oath is made of miſdemeanor in beating or abuſing a perſon ſerving any proceſs of this Court, the party offending is to ſtand committed upon motion; and no examination is in that caſe to be admitted.]

[Or. Ch. 115, 116.]

[So it is, when affidavit is made by two perſons of ſcandalous or contemptuous words againſt the Court, or the proceſs thereof. And,]

[A ſingle affidavit in this laſt caſe will be ſufficient for an attachment, whereupon the perſon charged with ſuch contempt ſhall be brought in to be examined. And if the miſdemeanor be confeſſed or proved, he is to be committed till he make the Court ſatisfaction, and pay the proſecutor his coſts. But if he appear not to be guilty, ſave by the oath of the affidator, he ſhall be diſcharged; but without having any coſts, in reſpect of the oath made againſt him.]

[Or. Ch. 116.]

New examination.

[Where a clerk or ſolicitor in cuſtody for ill practice, or other miſdemeanor, acquitted himſelf upon his examination on interrogatories, the Court diſcharged the contempt, notwithſtanding an affidavit made after the examination. But *ſaid*, if there was cauſe, a new examination ſhould be ordered as to that and other matters.]

[If without ſpecial order, an execution be taken out upon a trial at law directed by this Court, the party will be committed for the contempt.]

1 Px. Alm. 34.

No averment againſt the return.

[Upon the ſheriff's return of a reſcous, the reſcuer, and the party alſo privy to or aiding in it, is to be forthwith committed for ſuch contempt; for no averment lies againſt the return.]

[3 Px. Alm. 14.]

[And ſo it is, upon a like return of commiſſioners in a commiſſion of rebellion; but it may be the Court may expect an affidavit from them.]

[A contempt in not appearing or anſwering, is commonly a good cauſe to grant or continue an injunction.]

[*Said*, if a perſon is not in court, (by appearing, *&c.* eſpecially if he be in contempt,) he is not to be heard by counſel.]

[Where one in contempt had on motion got an order made in his favour; the Court upon motion diſmiſſed it.]

[The

[The plaintiff in a croſs-bill cannot proſecute the other for contempt in not anſwering, till eight days after he has anſwered the firſt bill.]

If defendant be in contempt for not anſwering, and on motion he obtain time to anſwer, if it be not expreſsly ordered that all contempts in the mean time be ſtayed, the plaintiff may goon and proſecute the defendant for not anſwering. Anſwer. Contempts ſtayed. 1 Vern 104.

Upon a decree for payment of money after a writ of execution, and an attachment returned, the Court refuſed to let the defendant be examined, unleſs he gave ſecurity to perform the decree. Decree. 2 Vern. 91.

Said, there muſt be two witneſſes to prove a contempt in not obeying a decree. 1 Harr. 273.

In a bill touching the eſtate of —— *Sacheverel*, deceaſed, who had iſſue a daughter by his firſt wife; the queſtion was, whether the defendant was married to Mr. *Sacheverel?* An advertiſement in the public prints, that whoever ſhall diſcover and make legal proof of the marriage in queſtion, ſhould have 100*l.* Adjudged a contempt, and the party procuring it committed. Contemp', what. 1 P. W. 676.

Suing the bail below pending a writ of error in parliament, is a contempt and breach of privilege. 1 P. W. 685.

A general act of pardon, though with exception of contempts, extends to pardon contempts in marrying infant wards of a court of equity. General act of pardon. 1 P. W. 696.

A commiſſion iſſued to inquire into the lunacy of the Lord *Wenman*; and his wife, though an Iriſh peereſs, was committed for not producing him to the commiſſioners. Contempt. 1 P. W. 701.

Defendant in contempt to a ſerjeant at arms for not anſwering, he puts in an inſufficient anſwer. If the plaintiff's clerk in court accepts the coſts, it purges the contempt; but if the coſts be not accepted, the plaintiff may go on, where he left off in his proceſs of contempt, for a further anſwer. Anſwer. Coſts. 2 P. W. 482. 2 Vez. 110.

Marrying an infant ward of the Court is a contempt; though the parties concerned had no notice, that the infant was a ward of the Court. Infant ward. 3 P. W. 116. 3 Atk. 306.

Though the father has a right to the guardianſhip of his children, and may take them, provided he be not guilty of a breach of the peace, from the perſon in whoſe cuſtody they are; yet if he takes them in coming to, or returning from the Court, it will be a contempt. 3 P. W. 155.

There

There must be a reference to a Master for a proper settlement, before a contempt for marrying a ward of Court can be cleared.

2 Ves. jun. 154.

Advertisements. Contempt.

Publisher of advertisements as to the proceedings of this Court, committed for contempt; but discharged on submission, and disclosing all circumstances under which the advertisement was published.

2 Ves. 520.

A contempt for non-performance of an order of this Court is a breach of the peace; and a man who has committed such contempt may be taken upon an attachment on a *Sunday*.

1 Atk. 58.

Close prisoner.

Defendant being in contempt and in the Fleet prison, for not paying money under a decree and obstinately refusing to pay: it was prayed that he might be committed a close prisoner; but the motion was refused.

4 Bro. 89.

Costs. Answer.

Defendant in custody for non-payment of costs after answer came in, cannot be detained till further answer, though exceptions have been allowed; for he had a right to be discharged upon putting in his answer, and being once supersedeable, always remain so, except on a new cause.

4 Bro. 223.

Contempts discharged.

Defendant in contempt discharged on putting in his answer, and depositing the utmost sum to which costs would amount, subject to taxation.

4 Bro. 296.

COMMITMENT.

VIDE

Contempt, and Writ of Execution of a Decree.

Commitment, what.

[A Person is said to stand committed, when by the Court he is ordered to be committed to prison; and he is thenceforth, in things to his disadvantage, looked upon as actually in prison for contempt.] And,

How.

[Though he be not then taken, nor in custody, yet the Court needs not be again moved for his commitment, but process may issue out against him; and he being taken, may without bail, and without further motion, be actually committed.]

If a man be present when an order of commitment be pronounced, he is instantly a prisoner, and the warden of the Fleet may take him to gaol directly.

1 Atk. 57.

In

In all cases of commitment for breach of an order, there must be an affidavit of service. Order. Service. 3 Atk. 619.

[Imprisonment upon contempts for matters past, may be discharged of grace after some punishment.] Discharged.

[But if the commitment be for non-performance of an order of Court, the contemptor ought not to be discharged till he has yielded obedience thereto. Yet it may be suspended for a time.] [Toth. 34.]

[Said, imprisonment for breach of a decree, is in nature of an execution; and therefore the custody ought to be straight, and the party not to have any liberty to go abroad, but by special leave of the Lord Chancellor.] Imprisonment.

[But no close imprisonment is to be but by express order, for wilful and extraordinary contempts and disobedience. Vide *Execution of a Decree.*]

PROCESS OF CONTEMPT.

[THERE must ordinarily be 15 days between the *teste* and return of every such process of contempt, excluding the day of the *teste*, and including the day of the return.] [1 Px. Alm. 32.]

[But if an answer be reported insufficient, or a plea or demurrer be over-ruled, then the process of contempt may be made returnable *immediatè*, and served on the clerk in Court, till the party arrive at such process as he was at, before such answer, *&c.* put in.] [Cl. Tut. 24.]

[The cause of the process issuing is indorsed on it.]

[In every of the three first process of contempt, the party when taken, must either give bond to appear, or he must come in and enter an appearance with the register thereto, else he will be committed to prison.] [1 Px. Alm. 32.]

[Upon an attachment and proclamation, the sheriff is to take bond in 40*l.* with sureties, for the defendant's appearance at the return of the writ, *&c.*]

[If the defendant does not appear, the sheriff may return your writ, and assign you the bond to sue, (though sometimes he will not assign it till you serve him with a rule to bring in his prisoner,) and upon his assigning it, you commonly give him a note to keep him indemnified.] 2 Atk. 507.

[Or

[Or if the bond is not good, or the party remains in cuſtody, and you would have him brought into court, you get a *cepi corpus* returned by the ſheriff, and move that the ſheriff may bring him in by a day.]

[If the ſheriff brings him not; then on affidavit of ſerving the rule, the ſheriff may be amerced 5*l.* and ſo from time to time, ſtill doubling the laſt ſum, till the ſheriff yield obedience.]

[Upon ſuch return, ſerving the rule and affidavit, the Court will on motion order a ſerjeant at arms to fetch up the party, if it is not too far off: the Court has ſometimes ordered one to *York*, which is 200 miles; but refuſed one to *Durham*, which is more.]

[If the ſheriff deliver not the party to the meſſenger, (or it may be after the firſt rule ſerved, and affidavit that the party is at liberty) the Court will amerce the ſheriff till he bring him in.]

2 Atk. 507.

[Theſe amerciaments are to be levied by being eſtreated in the Exchequer; or by proceſs out of the Petty Bag to the ſucceeding ſheriff, to levy and pay them into the Hamper.]

[Prac. H. Chan.]

[The wife is not to be brought in upon proceſs of contempt for not appearing, or for want of an anſwer, unleſs the huſband be alſo taken and brought in with her; for ſhe is not ordinarily to appear and anſwer without him.]

[Prac. H. Ch. 272.]

[All proceſs of contempt ſhall be made out into the proper county where the party againſt whom it iſſues dwells or reſides; unleſs he be then in or about *London*; in which caſe it may be directed into the county where he ſhall then be.]

[Or. Ch. 12, 112]

[If any perſon be taken upon proceſs otherwiſe, or irregularly iſſued, the party ſo taken, firſt appearing unto and ſatisfying the proceſs, ſhall be diſcharged of his contempt, and have his full coſts, to be taxed of courſe by the ſix clerks not towards the cauſe, for ſuch undue or irregular proſecution, from the time the error firſt grew, without motion.]

[This is now done by a Maſter.]

[Or. Ch. 112.]

[Where contempts were diſcharged by general pardon, and yet the other party ſued out proceſs of contempt, &c. He was ordered to pay coſts.]

[Cary, Rep 79.]

[The proſecutor of the contempt muſt do his beſt endeavour to procure the proceſs to be duly executed. And if one taken upon a proclamation, commiſſion of rebellion, or by the ſerjeant at arms, ſhall by proof make

make it appear to the Court, that the other has not done his beſt endeavour to have the firſt and precedent proceſs duly executed, but has been wilfully in default; the party offending ſhall pay the other very good coſts, for his wrongful vexation; and loſe the benefit of the proceſs returned without ſuch endeavour.] [Or. Ch. 12, 113.]

[All attachments in proceſs are to be diſcharged upon the defendant's payment, or tender to the plaintiff's clerk and refuſal, of the ordinary coſts of Court; and filing his plea, anſwer, or demurrer, as the caſe requires; but it muſt be upon motion or petition in that behalf.] And,

[If after ſuch conformity and payment, tender and refuſal, the contempt be further proſecuted; the party proſecuted ſhall be diſcharged with coſts] [Or. Ch. 113.]

Vide *Contempts and Commitment.*

COPIES.

VIDE

Depoſitions.
Proofs and Evidence.

[COPIES of records and pleadings are writ in looſe paper books; and all copies of bills, anſwers, depoſitions, or other record, or thing whatſoever belonging to the ſix clerks to copy, is to contain 15 lines at the leaſt in every ſheet of paper, writ fairly, orderly, and unwaſtefully.] [Or. Ch. 144.]

[No ſuch copy is to be delivered out of the office, till ſigned by the ſix clerk to whom it belongs, or his deputy in his abſence.]

[Nor is any copy not ſo ſigned, to be uſed in Court, or before a Maſter] [This is now] diſuſed.

[No bill or other pleading is to be copied by the under-clerk, or any for him, before it is filed with the ſix clerk to whom it belongs.] Or. Ch. 45, 105.] Ibid. 104.

[Said, if parties want copies of their own pleadings for private uſe, as for vouchers on a taxation of coſts, or ſuch like, their clerk in court will let them have them

them at 1 *d. per* ſheet, which is the bare charge of writing.]

[Paupers generally pay the ſame, for the mere labour of clerks writing.]

[In ſome caſes, copies of depoſitions and pleadings ſigned by the ſix clerk have been ordered to be recorded, and uſed as authentic; and in other caſes the Court has denied it.]

1 Ch. Rep. 15. 36.

CORPORATION.

[WHERE corporations are ſued here in their political capacity, they anſwer under the ſeal of the corporation: but if all thoſe of which the corporation conſiſts be charged as private perſons, they muſt anſwer upon oath.]

[Toth. 7.]

[Doubted, whether a *ſole* body politic muſt anſwer upon oath or no.]

[Toth. 13.]

Appearance.

After ſervice of a writ of execution of a decree againſt a corporation, the next proceſs is a diſtringas, and after that a ſequeſtration; which being once awarded, they can never after that come and pray to enter an appearance, as they might have done on the diſtringas, but the appearing being paſt the proceſs muſt go on.

Prec. Ch. 128.

When a corporation aggregate is defendant and refuſes to appear, or anſwer, or perform a decree, a diſtringas iſſues directed to the ſheriff of the city or county were ſuch corporation reſides.—For the form of the writ, ſee *Harr.* 263.

Bill againſt a corporation to diſcover writings, the defendants anſwer under their common ſeal; and ſo not being ſworn, will anſwer nothing in their own prejudice. It was ordered that the clerk of the company, and ſuch members as the plaintiff thought fit, ſhould anſwer on oath, and that the Maſter ſhould ſettle it.

2 Vern. 117.

Demurrer by book-keeper. Witneſs.

The ſecretary and book-keeper of the *Eaſt India* Company were defendants to a bill for diſcovery of entries and orders in the Company's books. The Company are not liable to a proſecution for perjury, though their anſwer be never ſo falſe; demurrer by the defendant that he was a mere witneſs.—Over-ruled.

3 P. W. 310.

COSTS.

VIDE

Demurrer.
Dismission.

[SOME are stated and uncertain upon some process of contempt, and upon certain proceedings; as below:] Costs certain.

[Others are uncertain, and to be taxed by a Master.] Uncertain taxed.

[If the plaintiff obtains a decree, he has generally his costs of suit: but if it be against a trustee not in fault, but who desires only to be directed or indemnified by the decree of the Court in the performance of the trust, he shall pay no costs.] Follow decree. Prec. Ch. 254. 3 P. W. 347. 3 Bro. 90. 1 Ves. jun. 246.

[A party in *forma pauperis* shall have costs, but pay none.] Pauper. Cl. Fut. 8.

[Said, infants, executors, or administrators, if they are not faulty, shall not pay costs out of their own estates; nor shall they pay costs out of his they represent, except he was in fault.] Infants. Trustees. Amb. 146. 3 Atk. 119.

[After hearing, costs are commonly taxed by a Master; but sometimes the Court thinks not fit to give full costs, and will order a certain sum.] Taxed.

[If costs are taxed by a Master, the Court on shewing an irregularity in the proceedings, as not giving notice, or such like, will send them back to the Master. But no retaxation will be ordered in respect to the mere *quantum.*] Irregularity in taxing.

[If process of contempt be irregularly issued or any irregular proceeding be, whereby the adverse party is put to charge, the Court will order the matter to be examined; and if found so, costs to be forthwith taxed and paid him.] Costs for irregularity.

[It is said, that heretofore no costs used to be paid, but *fine litis.*]

[Said, if a party procure an order to be drawn up contrary to the minutes, or make any false, irregular, or apparently needless step in the cause, the costs thereby occasioned will not be allowed him *fine litis*, though the decree be for him.]

[Said in court, and not denied, where a party is to pay costs for non-attendance, or any other fault, he must procure them to be taxed if he would set himself Costs taxed.

rectus in curia, or entitle himself to any favour; though the other party must furnish materials for such taxation, or at least be required so to do.]

How taxed.

[After an order to have costs taxed, the clerk or solicitor for the party that is to have them, delivers in a bill thereof to the Master to whom they are referred, who gives the other side a copy of the charge, (if desired) and on request he gives out a summons for the parties to attend him at a certain time, and so from time to time till the whole costs are taxed, and then he reports the *quantum* to the Court.]

Payment of costs, how obtained.

[The report being confirmed and the order duly entered, there may be a *subpœna* to the party to pay them; and if not thereupon paid, the order under seal, or if after a decree, the decretal order and writ of execution: and if upon due service thereof the costs be not paid, then upon affidavit thereof an attachment and further process of contempt to a sequestration go forth, if there be occasion.]

Where plaintiff loses the costs of defendant's contempt.

[Where a defendant in contempt puts in an answer without paying the costs of the process of contempt, and the plaintiff replies thereto, he hath lost the costs; for by replying, he admits the defendant to be *rectus in curia*, and the answer regular.]

No costs for solicitor's coming to town.

[Said, no costs are ordinarily allowed for a party or his solicitor's coming to town, though from the remotest part of the kingdom, or for the solicitor's attendance in town, save the common fees to a solicitor.]

Security.

[Said, upon affidavit to the satisfaction of the Court, that the complainant lived beyond sea, he was ordered to enter into security to answer costs of suit. And said, so it would be if he was about to go to live or stay long there.]

Solicitor ordered to pay costs.

[Yet upon affidavit that the complainant was not to be found, and that it was supposed he was run away, the Court did not order security.]

[But where a solicitor had acted throughout a cause in the plaintiff's absence, and now the bill being dismissed with costs the plaintiff was not to be found, the Court ordered the solicitor to pay the costs.] [1 Ch. Ca. 71.]

Solicitor's bill taxed.

[The Court upon motion will order a clerk or solicitor's bill of costs to be taxed by a Master; and that he add or diminish, as he shall see cause.]

[Where there was a prosecution at law for money on an award, though the Court ordered the money, by the

the anſwer ſworn due, to be brought into court, (or the injunction to ſtand diſſolved,) yet would not order the coſts of the proceedings at law to be brought in; becauſe it might upon hearing appear that the proceedings at law were againſt conſcience.] Coſts of proceedings at law.

[Where the Court was (*inter alia*) ordering a plaintiff his coſts at law, they would not order five pounds forfeited upon the ſtamp act, for the defendant's not entering his appearance, to be brought into the account.]

[Said, where an anſwer or depoſitions are ſuppreſſed, coſts are prayed by and given the other ſide of courſe.]

[The defendant moved that the plaintiff might be ſtayed from proceeding againſt him for an anſwer, till he had paid the defendant coſts for the ſcandal reported in the bill; and it was ſo ordered.] Proceedings ſtayed, till coſts paid.

[Where an injunction bill is diſmiſſed, the Court here doth not give the defendant the coſts of his proſecution at law upon a bond; becauſe he will have his full coſts there.] Coſts of proceedings at law.

[The coſts upon proceſs of contempt are the ſame in every cauſe upon the ſame proceſs: as,] Coſts upon proceſs of contempt.

	£.	s.	d.
[Upon an attachment - - - - - - -	0	10	0
——— Attachment with proclamation	0	20	0
——— Commiſſion of rebellion - -	0	40	0
The ſtanding fee for a ſerjeant at arms, called the *caption fee* - - - -	3	6	8
Beſides this, if he goes out of town, he charges you for every mile, as well coming as going	0	1	0

If not out of town, then what you can agree for, for his more than ordinary trouble; ſo that when you come this length, the charge is uncertain; and ſo it is in ſome meaſure upon the former proceſs, if warrants be taken thereupon, *&c.*]

[Coſts are alſo certain upon reports of inſufficient anſwers: as,]

[The firſt inſufficient anſwer, if ſwore before a Maſter - - - - - - - - - - - - - 40 *s.*

——— If by commiſſion - - - - - - - 50 *s.*

The ſecond, whether ſwore before a Maſter, or by commiſſion - - - - - - - - - - 60 *s.*

The third, whether ſwore before a Maſter, or by commiſſion - - - - - - - - - - - 80 *s.*

[The fourth, whether swore before a Master, or by commission] - - - - - - - - - 100 *s.*

[If an answer be reported sufficient, the plaintiff pays] - - - - - - - - - - - - 40 *s.*

For amending a bill after plea or demurrer put in 20 *s.*

[The plaintiff heretofore might have dismissed his own bill, paying 20 *s.* costs. But now by the statute for amendments of the law, full costs must be taxed by a Master.]

	£.	*s.*	*d.*
[On a dismission upon answer by disclaimer, the plaintiff pays seven nobles costs - - - - - - - -	2	6	8
——Upon plea or demurrer - - -	5	0	0
For amending a plea the defendant pays	0	60	0
Upon over-ruling a plea or demurrer was paid five marks - - - -	0	66	8
——But now by a late order - - -	5	0	0
On over-ruling or allowing exceptions to a report was paid formerly - -	0	40	0
——Now - - - - - - - - -	5	0	0
And besides, for every exception and distinct branch of an exception, which is waved and not opened, is paid or deducted out of the 5 *l.* deposited	0	10	0
If opened, over-ruled, and declared frivolous - - - - - - - - -	0	20	0
If notice be thrice given of a motion, and yet none made, the party who gave such notice is sometimes ordered to pay for each time 10 *s.* in all -	0	30	0

[If it be a matter of great moment, and many counsel fee'd, costs are to be taxed by a Master.]

[If a cause be put off upon the neglect or default of him who procured it to be set down for hearing, he must pay the costs of the day at least]	5	0	0

[*For costs in particular cases the reader is referred to* Turner's Costs in Chancery.]

Revivor.

Feme sole brings a bill, and pending the suit marries; baron and feme bring a bill of revivor, and obtain a decree with costs, they shall have costs of the whole suit, deducting the charge of the bill of revivor.

2 Vern. 318.

2 Ves. 461. 465.

Where the party to pay costs dies, and the costs are *not taxed*, you cannot revive for them only, because it is

is a perſonal demand. But where the plaintiff died after judgment for his coſts, but before taxation, his repreſentatives were allowed to revive. 3 Vez. jun. 197.

So after a decree making the coſts a lien upon the real eſtate. 3 Atk. 772.

So a plea to a bill of revivor for coſts *ordered to be paid into the bank*; over-ruled. 1 Bro. 438.

Bill of revivor will lie for coſts where there is a particular found ordered to anſwer them; or where the decree is executory, and there is ſomething to be done. 3 Atk. 812. 2 Vez. 580. 772.

Coſts do not always follow the event.—Money was upon account found due to the defendant; yet, as it was much leſs than his anſwer claimed, he had no coſts. Follow event. 1 P. W. 376.

A mortgagee ſhall not onerate his pledge with coſts occaſioned by his unjuſt defence. Mortgagee. 1 P. W. 395.

Heir at law or heir male to the honor of a family, if probable cauſe to contend for the family eſtate, ſhall not pay coſts. Heir. 1 P. W. 482.

Where an heir at law will file a bill to ſet aſide a will, inſtead of an ejectment, he ſhall pay coſts if he fails; but where he is brought before the Court as a defendant and an iſſue directed, though he fail in overturning the will, the Court will not give coſts againſt him. Heir. Amb. 163. 2 P. W. 285. 3 P. W. 373. 2 Atk. 424. 3 Atk. 388. 3 Bro. 214. 1 Vez. jun. 205.

Where a deviſee files a bill *in perpetuam rei memoriam*, and the heir at law only croſs-examines the witneſſes, he ſhall have his coſts; but if he examine witneſſes againſt the will he ſhall not. Heir. 3 Atk. 387.

Upon an attorney's or ſolicitor's appearing to be guilty of groſs neglect, the Court will order him to pay coſts. Attorney. 1 P. W. 593.

Where a legatee or creditor comes in before the Maſter for his legacy or debt, he ſhall have his coſts. Legatee. 2 P. W. 27.

In caſe of an iſſue out of Chancery, it is proper to move that Court for coſts for not going to trial, or to move there for a ſpecial jury. Iſſue. 2 P. W. 68.

Governors of a charity though not guilty of corruption, yet if extremely negligent, ſhall pay coſts. Charity. 2 P. W. 285.

An infant by *prochein amy* brings a bill and never ſtirs in it after he comes of age, the infant and *prochein amy* are both liable to coſts. Infant. 2 P. W. 297.

The Court will order the coſts on a reference for a maintenance without ſuit. Amb. 146.

On a bill of partition no coſts on either ſide.—On a bill to ſettle the boundaries of a manor, an iſſue is directed, Partition. Boundaries.

rected, which being found for the defendant on three trials, he had the costs both at law and in equity, in regard he had no bill, and the plaintiff might have tried it at law without coming into equity.

2 P. W. 376.

Bill and answer.

Where a cause is brought on upon bill and answer if the bill was dismissed against any of the defendants, only 40 *s.* were paid, but if the plaintiff had a decree with costs, it was costs to be taxed; but this practice was altered by Lord *Hardwicke*, and *where the cause is set down* upon *bill and answer only*, or comes on after withdrawing the replication, it is now discretionary in the Court to dismiss with 40 *s.* costs, or costs to be taxed, or no costs.

2 P. W. 387.

2 Atk. 288.
3 Atk. 1.

Officer of the court. Neglect.

Plaintiff having paid the officer his fee, and the officer having neglected his duty whereby the process became irregular, the plaintiff must pay the costs but have them over against the officer; and though the officer in such case die, yet this being a duty and matter of contract, his executor will be liable.

2 P. W. 658.

Assets.

Where a bill is brought to secure and have the benefit of a contingent interest devised over, the costs shall be paid out of the assets of the testator, whose will occasioned the difficulty; so where the ambiguity of the will occasions the suit.

3 P. W. 303.

3 Bro. 25.

Laches.

There had not been any demand or any rent paid for 30 years, the person entitled recovered upon a verdict. The defendant paid the costs at law, but as the laches arose on the part of the plaintiff, the Court would not allow him costs against the defendant.

2 Atk. 14.

Fraud.

In notorious frauds the Court used anciently to make defendant pay *exemplary* costs, but this practice has been disused from the difficulty of carrying it into execution.

2 Atk. 43.

Offer of accommodation refused.

Where the plaintiff refused a fair offer of accommodation, the bill was dismissed with costs, his obstinacy being an aggravation.

2 Atk. 48.

Executor.

Where the estate of two testators were so blended as to create confusion, the executor of an executor was excused costs, though it appeared he had assets enough to pay the plaintiff's debt.

2 Atk. 80.

Costs reserved till report.

As it may accelerate a decree, the Court postpones the consideration of costs till a cause comes back from the Master.

2 Atk. 111.

Executors. Fraud.

Notwithstanding a testator directed that his executors for any expences they should be put to, should be allowed

2 Atk. 126.

lowed their costs out of his estate, yet as the executors acted fraudulently, the Court decreed costs against them.

Neither plaintiff or defendant entitled to costs on a bill to perpetuate the testimony of witnesses; but where plaintiff was under the necessity of filing a bill to prevent multiplicity of actions brought against him to try a custom, which one would have determined, the Court directed an issue, which being in his favour the Court ordered him the costs both at law and in equity. Bill to perpetuate testimony, 2 Atk. 167.

Where plaintiff was so poor that he could not carry on the cause, Lord *Hardwicke* ordered the costs decreed to be paid by defendant to be taxed and paid, to enable plaintiff to go on with the cause. 2 Atk. 400.

The Master reported proceedings under a commission to examine witnesses, irregular; on exceptions, the Court thought them regular, allowed the exceptions, and gave the successful party his costs; but the order for costs was discharged, the proceedings not being vexatious. Vexatious proceedings. 3 Atk. 235.

The rule is not so general that parties cannot appeal for costs only; in particular cases the rule has been dispensed with. *Quære*—Whether the Court will dispense with the rule only in such cases where it appears by the decree that costs are improperly given? Or where the Court must go into the merits of the cause? Appeal. Amb. 521. 1 Ves. 250.

Rehearings for costs ought not to be encouraged, because they are discretionary, but such rehearings are allowed on particular circumstances, as where the mistake was so apparent that upon a motion before inrolment the minutes would have been altered. Rehearings, 1 Bro. 140.

And a difference has been taken with respect to rehearings between costs charged upon the person and costs out of the estate. Ibid.

It must be an actual tender to excuse costs. Tender. 1 Ves. 339.

Costs, on reversing an order for allowing a demurrer, ordered to be refunded. Costs refunded, 1 Ves. 542. 2 Ves. 109.

Security for costs by a plaintiff beyond sea should be applied for *before time* for answering is obtained, if it appears upon the bill, or is in the defendants knowledge, otherwise it may be applied for in any stage of the cause. Security. 2 Ves 24. 2 Bro. 609.

Where the party lives abroad, 40 *l.* to answer costs is the old rule, which though now low is not increased by the Court, unless on terms. Security. What sum. 2 Ves. 557.

Where plaintiff stated himself in the bill to be on a voyage to *New York*, in *America*, it was not sufficient

evidence that he was resident abroad, *which must appear to to the Court* before he will be ordered to give security for costs.

3 Bro. 371.

Defendant. Security. 2 Bro 186.

Defendant having destroyed the subject of the suit and absconding, shall find security for costs, otherwise the plaintiff shall be at liberty to dismiss his own bill without costs.

Scandal. Reference. Amb. 464.

If a bill be referred for scandal and impertinence, and so reported, exceptions being taken to the report and allowed, the plaintiff shall have the costs of the reference; but he shall not on exceptions allowed to the Master's report of irregularity.

Lien for costs. 2 Vez. 25.

A *voluntary* release by client shall not defeat the clerk in court of his lien for costs.

Lunatic's estate. 2 Vez. 25.

No costs allowed to relations of a lunatic for their attendance before a Master to check the accounts, though notice is always given them for that purpose.

2 Vez. 223.

Said, that a man cannot come into equity for a decree for costs only.

Dower. 1 Bro. 134.

On an assignment of dower, the dowerefs shall have no costs unless other questions are raised in which the party is vexatious.

Trial at law. 1 Bro. 420.

Where the material issue is found for the party who sets down the cause for further directions, he must have his costs at law.

Exceptions to report of costs. 3 Bro. 321.

Exceptions are not taken to the Master's report for costs only, the method is to state the articles objected to and pray leave to except.

Follow event. 1 Vez. jun. 55.

Costs are not given to a party claiming under a contract which is not meritorious, even though he recovers upon it—not even to a trustee.

Executors. Trustees. 1 Vez. jun. 205.

Trustees and executors though they make a claim, yet if it is merely by way of the point to the opinion of the Court, shall have their costs.

Discovery. 1 Vez. jun. 423.

The rule that the plaintiff in a bill of discovery should pay costs in all cases is too general; he ought only where he files a bill in the first instance, not where compelled to it by the defendant's refusal.

Bills of costs. 2 Vez. 203.

Bills of costs have been examined after a long period, and even after payments made.

It were endless to enumerate all the decisions on the question of costs, since it is involved in most of the adjudged cases; the editor therefore following the plan of the original work, has selected a few determinations on the subject, from which general principles may be extracted and applied.

It

It may not however be amiss to observe, that costs do not always follow the event; 1 Vez. jun. 55.; *they are entirely in the discretion of the Court*; 2 Atk. 111. 400. 3 Bro. 390 *which, in considering them, decides according to its conscience, and not according to its authority*; 2 Atk. 553. *That misconduct is sometimes a ground for refusing them to a prevailing party, and is the reason why an unsuccessful party is in general compelled to pay them.*

COUNSELLOR.

[WHAT a counsel knows in a cause as counsellor, he shall not be put to answer.] [1 Ch.Ca.277.]

[Otherwise of a scrivener, though he have taken the usual oath that scriveners do before they are made free of *London*, not to discover the secrets of those persons that employ them.] [2 Ch. Ca. 242. 2 Ch. Rep. 29.]

[Nor shall a counsellor be compelled, nor ought he (perhaps unless by consent of his clients) to be examined upon any matter wherein he was of council, either by the indifferent choice of both parties, or with either of them, by reason of any annuity or fee.] [Ca. Rep. 143.]

A counsel ought not to take a conveyance from the right heir, for his own benefit. 3 Atk. 38.

Counsel have a right to drafts as precedents, but not to detain them, where either party may be benefited by inspecting them.

A demurrer to a bill for a discovery of a case laid before the plaintiff's own counsel for an opinion, and also for a discovery of the facts stated in the case, was over-ruled. 2 Atk. 214.

A counsel cannot maintain an action for fees, or if he happens to be a mortgagee to insist on more than legal interest; under pretence of a gratuity for business done in the way of a counsel. 2 Atk. 332.

By the stat. *Westm.* 1. *c.* 29. attornies and serjeant counters who have been guilty of any mal-practices, and have acted unbecoming their profession, may be silenced and not be allowed to be heard any more in the way of their profession.

Barristers

2 Atk. 173. Barristers are included under the name of serjeant counters. Lord *Coke* in his 2d institute and exposition upon stat. *Westm.* 1 *c.* 29. page 214.

3 Ves. jun. 501. The duty of a counsellor in preparing pleadings is not to make a case for his client, but to state it fairly from his instructions.

DAY-WRIT.

2 Ch. Rep. 6. [WHERE a matter of account was referred to commissioners who could not settle them without the attendance of the plaintiff who was in execution, the Court ordered he should have day-writs (in the nature of day-rules in the court of law) as often as needful, for attending the commissioners, and without paying fees either for making or sealing such writs.]

DECREE AND DISMISSION.

VIDE

Dismission.

Decree. [A DECREE is a final sentence or order of Court, determining the right of matters in question according to equity, and ordering the parties accordingly, pronounced on hearing and understanding of the cause; and afterwards drawn up and duly signed and inrolled.]

Altering decree. [By order, minutes of decrees and orders pronounced in court are to be read there, that all may take notice and speak to the testifying of them, if there be occasion. And no petition or motion is afterwards to be made of any orders not agreeing with the minutes, unless the minutes have been altered after reading them, or the register shall without consent not pursue them.]

[Or. Chanc. 171.]

Altering decree. [Till the decretal order is drawn up, signed, and inrolled, it has the force only of an interlocutory order, and is not final, but may be altered upon a rehearing or sometimes on motion.]

An

[An original bill is not to be admitted to explain a decree upon a fact precedent.] [1 Ch. Ca. 45.]

[Nor can it be crossed, altered, or explained, upon a bare petition only; but it may be thereby stayed a while till it can be moved in court.] Altering decree. Petition.

A decree though obtained by fraud, cannot be set aside by petition. Petition. 3 Bro. 74.

[No decree or dismission shall be presented to the Lord Keeper or Master of the Rolls to be signed, till it be signed by the six clerk in the cause or his deputy.] [1 Px. Alm. 20.] [1 Px. Alm. 26. Or. Ch. 41. 117.]

[If a decree, dismission, or injunction, be made or granted by any of the judges sitting in Chancery, it must be signed by them as shall make or grant the same, and after by the Lord Keeper before it be entered with the register.] Decree made by a judge.

[A decree or dismission pronounced upon hearing ought to be drawn up, signed, and inrolled, before the first day of the next *Michaelmas* or *Easter* term after the pronouncing thereof, and not at any time after without special leave of the Court.] Signing and inrolling decrees. [Or. Ch. 117.]

[Though a party be dead, yet if the other party or his representative come in time, the Court will order the decree to be inrolled.] Signing, &c. [2 Ch. Ca. 227.]

[The order being drawn up in form by one the registers according to the minutes, and by the pleadings, and signed and inrolled as aforesaid of record, may not be reversed, altered, or explained, upon any motion or by any order; but the party, if he has cause, is put to his bill of review, which is not admitted but by special order upon good cause shewn; it being convenient both with respect to the dignity of the Court and to the parties, *ut sit finis litium.*] [Pr. H. Ch. 21.] [3 Px. Alm. 9. Toth. 47.]

[Though after inrolment a decree cannot ordinarily be altered but by bill of review; yet in case of miscasting or miscounting, where the matter demonstratively appears from the decree itself to be mistaken, it may be explained and reconciled by order.] Miscasting. [Com. Sol. 35. 1 Px. Alm. 26.]

[Where it is to be noted that by *miscasting* is not to be understood misvaluing, but only a mistake in the auditing or numbering.] [Toth. 42.]

[One defendant pleaded outlawry in the plaintiff; another defendant answered, and a decree passed against him: afterwards the defendant, who pleaded the outlawry, brings an original bill to set aside this decree, and it was done, he having a title paramount to the former plaintiff's.] Decree set aside original bill. [1 Ch. Ca. 3.]

[After

Account.

[After a decretal order is pronounced, matters of account, and such like, which are necessary to perfect the decree, may be and commonly are examined and settled before a Master; but nothing that is against the foundation of the decree.]

Account. Inrolment.

[Said, if (*inter alia*) an account is decreed and the decree be inrolled, and then the report of the account is confirmed, there ought in strictness to be a second inrolment of the whole report. But on petition it is often dispensed with, and the plaintiff is allowed to take a writ of execution of the whole without such second inrolment.]

Account. Inrolment. 2 Atk. 383.

But now the Court does not suffer decrees to account to be signed and inrolled, because it ties up their hands from relieving, if there should have been any defect in the directions of the decree.

Inrolment. 1 Vern. 131.

Inrolment of a decree may be opened if the inrolment were gained by surprise, and there is any irregularity in it.

Inrolment. Plea. 1 Vern. 310.

A decree of dismission may be pleaded in bar to a new bill though it is not signed and inrolled.—*Sed vide contrâ*, 3 *Atk.* 809. 2 *Vez.* 577.

1 Vez. 205. Inrolment opened.

Discretionary in the Court to set aside the inrolment of a decree on circumstances, as where the plaintiff continued an infant till near the time of the hearing, or was beyond sea, and the cause so much neglected by the solicitor that the merits were not heard.

1 Vez. 326.

Inrolment of a decree vacated, being too quick, though strictly regular.

Decree for defendant. [Pr. H. Ch. 22. 3 Px. Alm. 10.]

[A decree is sometimes made for the defendant when the equity appears to be with him; and this is better than to admit a cross bill to be put in by him, and going to new proofs after publication in the first cause.]

Parties. Ch. Ca. 152. 231.

[All original parties to the suit, or those that are made parties thereto or to the decree, of full age, &c. and such as claim under them *pendente lite*, are regularly bound by the decree.]

Parties. [Toth. 45.]

[But any that *bonâ fide* came to be interested in the matter in question by conveyance from the defendant before the bill exhibited, and is not made a party either by bill or by order, is not bound.]

Parties. [Toth. 45.]

[Where one comes in *pendente lite*, and while the suit is in full prosecution and without any colour of allowance or privity of the Court, there regularly the decree bindeth.]

[But

[But if there were any intermission of suit, or the Court were made acquainted with the conveyance, the Court is to give order upon the special matter according to justice and equity.] [Toth. 45.]

[Parties not served with process *ad audiendum judicium*, are not bound unless they appear *gratis* on the hearing.] Parties. [Toth. 45. 1 Px. Alm. 26.]

Defendant having notice of a decree, being present when it was made, though he was no party to it, pays money contrary to the decree, and is compelled to pay it over again. Notice. Party. 1 Vern. 57. 2 Ch. Rep. 82. S. C.

[A decree binds or rather alters, (not the legal interest,) but it binds the *person* who may by decree be ordered to convey and assure the interest; and if he refuses to obey the decree, the Court will imprison him till he conform; and it so far affects the right and title to lands and goods, that the Court by sequestration and injunction doth dispose of the possession to whom it judges the right in conscience is.] How binding. [Px. H. Ch. 22. 1 Px. Alm. 27. Toth. 10.]

[Under clerks may bring over from the six clerks office to the Rolls chapel any decree or dismission after the same are signed, to be seen by the usher of the court or his deputy only, that so he may judge what parchment is necessary to be allowed for the inrolling thereof.] Under clerks. [Or. Ch. 19.]

[Every decree must before inrolment be signed as aforesaid.]

[Decrees and dismissions ought to be drawn up as short as may be with convenience and not recite the pleadings largely, but the sum of them briefly.] How decrees drawn. [Com. Att. 435.]

[The registers are to be careful in the penning and drawing up of decrees, and especially in matters of difficulty and weight.]

[And by ancient order, when they present decrees to the Lord Chancellor, they ought to acquaint him which are decrees of weight, that they may be read and reviewed before his Lordship sign them.] [Toth. 41.]

[Decrees or dismissions made or granted in the Rolls or at *Westminster*, on such days as the Lord Chancellor is not present, being drawn up, are at first to be signed by the Master of the Rolls or the judge that sat at the hearing of the cause, and then presented to the Lord Chancellor to be by him likewise signed, which done, they may be inrolled.] How signed and inrolled. [Toth. 41.]

[Within

[Within one term after a cause shall be determined by decree or dismission, such decree and dismission and all other records in the clerk's hands shall be delivered over to the six clerk or his deputy.]

[Or. Ch. 47.]

Decrees after judgment.

[Decrees upon suits brought after judgment, shall contain no words to make void or weaken the judgment, but shall only correct the corrupt conscience of the party, and rule him to make restitution or perform other acts, according to the equity of the case.]

[Toth. 46.]

Decree concerning land.

[Said, where the decree concerns lands, even so low as leases or terms for years, it must be entered in the register's docket-book within six months after it is pronounced, else it should not prejudice purchasers.]

[Com. Att. 437]

Decree to foreclose.

[Said, in court, if after a decree of foreclosure the party has recourse to the defendant's person, it opens the decree; but the Master of the Rolls seemed to think it might be done with leave of the Court without producing that effect.]

Decree to foreclose.

[When a decree is to foreclose, the Court will in cases of necessity enlarge the time for the performance in paying the money, though the decree be signed and inrolled.]

[1 Ch. Ca. 64.]

Decree to foreclose infant.

In a decree of foreclosure, though an infant has a day to shew cause against the decree after he comes of age, yet he is not to go into the account, nor is he so much as entitled to redeem the mortgage, but is only allowed to shew error in the decree.

3 P. W. 352.

Original bill after decree, former decree evidence.

[Where after a decree an original bill is become necessary, as in case the decree be of twenty or thirty years standing, or that the party neglecting to procure a stay of proceedings at law, is ousted of his possession by judgment there, in such case the former decree may be set forth as evidence; but the Court will not decree the same thing merely upon the foot of that decree, but will examine the grounds of the former decree ere they make a new one.]

[2 Ch. Rep. 128.]

Examination of defendant after decree.

After decree and a writ of execution and attachment returned, the Court refused to give leave to defendant to be examined, unless he gave security to abide the decree.

2 Vern. 91.

Decree against defendant thoughexamined as a witness.

Plaintiff may have a decree against a defendant who has been examined under the usual order as a witness, upon other matters to which he was not examined.

Amb. 583.

Plea.

To support a plea of a former decree, you must state so much of the first bill and answer as will shew that the same point was then in issue.

2 Atk. 603.

If after a decree a caveat be entered to ſtay ſigning and inrolling, it ſtays the ſigning twenty-eight days, not only after pronouncing the decree, but twenty-eight days after preſenting it to the Chancellor to be inrolled, and notice given by the Lord Chancellor's ſecretary to the clerk on the other ſide. Caveat. 1 P. W. 609.

A decree made by conſent cannot be ſet aſide. Decree by conſent. 2 Vez. 488.

A final decree cannot be made upon an interlocutory order without conſent. Final decree. 3 Bro. 149.

A decree had been paſſed and entered without having before the Court a perſonal repreſentative, who became ſo by adminiſtration after the bill filed. Motion to inſert in the bill that he was adminiſtrator, in order to bring him before the Maſter; refuſed, if there was any thing in the decree directing him to pay; if the intention was merely that he might be a witneſs to what was done, the motion was proper. Amending bill after decree. 1 Vez. jun. 68.

A decretal order cannot be diſcharged upon motion. Decretal order diſcharged. 1 Vez. jun. 93.

DEEDS AND WRITINGS.

[IN a bill of diſcovery of and to recover deeds or writings, and to be helped and relieved by decree on the matter of ſuch deeds, there muſt be affidavit made by the complainant, that he or his anceſtors had ſuch writings in his or their poſſeſſion, that they were caſually loſt and that he knows not where they are, unleſs they be come to the defendant's hands or to this purpoſe, elſe the defendant may demur.] As to affidavit upon bill of diſcovery. [Pz. Alm. 4. 1 Ch. Ca. 11.]

[But if the bill is only to be relieved againſt a deed in another's hands, or that the bill ſeeks no decree, but prays barely to have the defendant diſcover whether he hath ſuch deeds or no, or to have the deeds produced at a trial, there needs no oath of the plaintiff.] Affidavit, &c. 1 Ch. Ca. 11.

If the bill be grounded on the loſs of a bond, as it is the loſs which gives the Court juriſdiction of the cauſe, affidavit muſt be made of it. Affidavit, &c. 1 Ch. Ca. 231.

But if the bill be for the diſcovery of a deed only, plaintiff need not make oath of the loſs of it, as he muſt Affidavit, &c. 1 Vern. 247.

must do when he comes for relief; for he cannot translate the jurisdiction without oath made of the loss of the deed.

Affidavit, &c.

Where a bill was brought for the bare discovery of a deed, and the defendant demurred because the plaintiff had not made oath, according to the course of the Court, that he had not the deed upon which this distinction was taken and allowed by the Court; *viz.* that where a person comes for a discovery and prays relief, there it is necessary for him to make affidavit of the want of the deed; but when he seeks but a bare discovery as to have it produced at a trial, it is not necessary; for it is not to be presumed that the plaintiff in either of the latter cases would do so absurd a thing as exhibit a bill if he had the deed.

1 Vern. 180.
1 Ch. Rep 51.
1 Vern. 59.
contra.

Affidavit, &c.

If a bill be purely for a discovery and delivering up a deed and prays no relief, an affidavit that plaintiff hath not the deed is not necessary; but if the bill be generally for relief upon any bond or deed, as to recover money upon the bond or profits of land under the deed, an affidavit that the deed is not in the plaintiff's custody must be annexed, because the bill does by consequence seek to transfer the jurisdiction from law to equity.

2 P. W. 541.

Affidavit, &c.

When a bill is exhibited for a general discovery of deeds, it is not necessary for the plaintiff to annex the usual affidavit that he has none of them in his custody: but where the bill is for a discovery of a particular bond, for want of which plaintiff could not recover his debt at law or the possession in ejectment, in these cases it is fit he should make oath that he himself has not the bond or deed, because if he had, his remedy is proper and open at law, and then he is not to put another to the unnecessary expence of an answer to deny his having it.

Prec. in Ch. 536.
3 Atk. 17.

Writings delivered out of court.

[Where writings brought into court (*viz.* into the hands of a Master by order of the Court) were ordered to be delivered out to be used at law, they were ordered to be delivered upon a schedule to the party who brought them in, and he was to produce them and all others confessed by his answer, or produced before the Master (if necessary) at the trial, *&c.* at law, and to return those delivered out here after trial, *&c.*]

[If deeds are brought into court or confessed by answer, the Court, upon motion of course, will order such

such of them as the party needs, to be delivered out to the solicitor or produced before the examiner or commissioners, that they may be proved; and that after that is done they be returned.]

Delivered to Master, with liberty for adverse party to inspect.

[Upon a bill to foreclose the mortgaged lands were decreed to be sold: a purchaser being reported, the defendant moves that the mortgagee might bring his deeds to and leave them with a counsel who was to draw the conveyance. The Court would not order him to part with his deeds, but ordered they should be brought before a Master, where the counsel might inspect them.]

All writings and exhibits brought in to the Master.

[A defendant ordered to be examined to an account on interrogatories, is examined short; the complainant moves that the defendant may upon oath bring before a Master all papers relating to the cause, which the Court refused to order; for at this rate, said, causes would never come to an end; but ordered all writings and exhibits proved by the depositions to be brought in.]

[Nor would the Court suffer the interrogatories to be amended, &c. but said, if at last they found themselves pinched they might move the Court again.]

Plaintiff to give defendant copies of deeds.

[Where a deed in the plaintiff's hands, mentioned in the plaintiff's bill was necessary to the defendant's making his defence a full answer; the Court ordered the plaintiff should give him a copy of it.]

Defendant to give plaintiff copies.

[In an answer to a bill for discovery of deeds, the defendant confesses the deeds but does not set them forth, because he would (he says) save the defendant the charge, and says he shall have copies of them when he pleases. The Court upon motion ordered the defendant to give the plaintiff copies of the deeds, without sending them to a Master.]

Inspection of deeds refused.

An order made at the Rolls that the defendant might inspect a deed proved in the cause and referred to by the depositions, as being part thereof, discharged by the Chancellor, for that a defendant before hearing is not to see the strength of the cause, or any deed to pick holes in it. 2 P. W. 410.

The defendant's witness proves a deed and refers to it in his deposition; the plaintiff cannot compel the defendant to produce the deed at the hearing, the reference thereto not making it part of the deposition.— 3 P. W. 35
Sed vide Bettison v. *Farrington*, where it is said by the

2 P. W. 178. in notis. Chancellor that by defendant's referring to deeds in their answer, they make them part of their answer. 3 P. W. 363. The editor, however, puts a *quære* to the case.

DEMURRER TO BILL.

VIDE

Commission to answer.
Interrogatories.
Examination.

Demurrer what. [IS an allegation of the defendant, which, admitting the matter of fact or some of them, alleged by the defendant to be true, shews that as they are set forth by the complainant himself, they are insufficient for him to proceed upon or to oblige the defendant to answer; and therefore demands the judgment of the Court, whether the defendant shall be compelled to make answer to the plaintiff's bill, or to some certain part thereof.] Prac. H. Ch. 12.

3 Vez. jun. 253. The ground of a demurrer must be a short point, upon which it is clear the bill would be dismissed with costs at the hearing.

Causes of demurrer. [The causes of demurrer are properly upon matter defective in the plaintiff's bill, and not from any foreign matter alleged by the defendant; and therefore in the demurrer it is said, *as appears by the plaintiff's own shewing.*] Px. Alm. 13.

Causes. Mitf. Treat. 100. Upon the omission of matter which ought to be therein or attendant thereon.

End of demurrer. The principal ends of a demurrer are to avoid a discovery which may be prejudicial to the defendant, to cover a defective title, or to prevent unnecessary expence. If no one of these ends is obtained, there is little use in a demurrer; for in general, if a demurrer would hold to a bill, the Court, though the defendant answers, will not grant relief at the hearing. Mitf. Treat. 100.

To answer. [1 Ch. Ca. 56. 2 Ch. Ca. 8.] [Doubted, whether, in some special cases, a demurrer may not be put into an answer; it has been allowed.]

To replication. [So where the replication contained new matter not in the bill (or answer), but what the plaintiff knew of

of at the exhibiting his bill; the defendant pleaded, and demurred to the replication, and the Court allowed it.] [1 Ch. Rep. 259.]

[As no plea, so no demurrer, shall be admitted after attachment with proclamation returned. But upon motion in open court, and affidavit of the cause of the delay.] When admitted. [Or. Ch. 99.]

[Yet where, after a proclamation returned, there came a general pardon, and the defendant appeared, and put in a demurrer: it was held he might so do.] 1 Ch. Ca. 232.

No demurrer after a plea. 1 Vern. 78.

A demurrer not coupled with a plea or answer, must be filed within eight days, exclusive of the day of appearance, or before an order for time be obtained: the Court never indulging the defendant with time to demur alone. Hind. 210.

A demurrer cannot be regularly filed under an order for time, it being the condition of every order for time, that the defendant shall not demur alone. 2 P. W. 464.

Demurrer may be filed after time for answering be out, provided it is filed, before process of contempt issues. 3 Bro. 372.

[The husband alone cannot demur for the wife.] Baron and feme. Toth. 73.

[If a defendant obstinately insists upon his demurrer, and refuses to answer, where the Court is of opinion that sufficient matter is alleged to oblige him to answer, and for the Court to proceed upon, the Court will decree the matter of the plaintiff's bill, for by the demurrer are confessed all matters of fact, that are well alleged,] *and the facts alone without the conclusions of law.* Decree. [Pr. H. Ch. 13.] 1 Vez. jun. 78. 289.

[Though by rule of the Court, every demurrer shall express the several causes of demurrer; yet it is said, other causes may be insisted upon at the arguing thereof. But if any cause shall be insisted on at the arguing, besides what is particularly alleged in the ingrossment on the file, and the bill be dismissed in respect of such cause newly alleged; yet the defendant shall pay the ordinary costs of five marks, if the causes particularly alleged be disallowed.] Demurring at the bar. [Pr. Alm. 18.] Or. Ch. 97.

It is not now the practice that the defendant should pay the costs of the demurrer on record being overruled, when a demurrer at the bar is allowed; but he is not to receive his costs, and what is said in 1 *Vern.* 78. is not law. Demurring at the bar. Costs. 3 P. W. 371.

General demurrer.

[Ca. Rep. 125.

[If a general demurrer be put in, it will be over-ruled]—*this must mean, where there is any part of the bill, either the relief or the discovery, to which defendant ought to answer:*

Amending bill.

[Com. Att. 426.

[If a demurrer be put in upon any slip or mistake in the bill, the plaintiff paying the defendant's clerk twenty shillings costs, may of course, without motion, amend his bill within eight days after the demurrer put in; but not after that time without consent.]

But plaintiff must now move to amend, and that before the demurrer is set down to be argued, otherwise he must pay the costs defendant has been at in getting the order for setting down demurrer to be argued, and twenty shillings besides.

1 Harr. 414.

1 Ves. jun. 448.

After argument of a demurrer to the whole bill, it is not usual to allow an amendment, except in case of a demurrer for want of parties—though it is sometimes allowed.

2 P. W. 300.

2 Atk. 311.

Eight days after filing demurrer not to be argued.

[If within eight days after filing a demurrer, the plaintiff admits it to be good, and pays the defendant's clerk forty shillings, the defendant need not set it down to be argued, for the bill stands dismissed of course, without motion, unless both sides agree to the amendment thereof; but such dismission is no bar to a new bill.]

[Com. At. 126, 7.]

Costs.

[As if a plea, so if a demurrer, be over-ruled, the defendant pays five marks (*now five pounds*) costs; but if on arguing it be adjudged good, the bill is dismissed, and plaintiff pays costs.]

Costs.

[If upon a *dedimus* the defendant returns no answer, but a demurrer or a plea, or both, which shall happen to be over-ruled, he shall pay the usual costs of five marks, (*now five pounds*,) and though they be allowed good, yet he shall have no costs; because of the needless trouble and delay given the plaintiff by the commission, without which the defendant might have put in his plea and demurrer.]

[Px. Alm. 14.]

1 Vern. 282.

Entering with the Register.

[If a demurrer be not by the defendant, within eight days after filing, entered with the register, in order to be set down to be argued, it is over-ruled of course, and the plaintiff may take out process for costs, and a better answer.]

[Ibid. Toth. 17.]

Where determined.

[As a plea, so a demurrer, may be brought on either in common course, or by order on motion or petition;

petition; but they are all to be determined in open court.] [Px. Alm. 14. Or. Ch. 97.]

[As the register shall not enter any plea, so neither shall he enter any demurrer in the paper at the instance of any person, upon a warrant for setting down the same on a certain day, unless the suitor shall bring such order or warrant to the Register to be entered two days before the day appointed for hearing. And after the paper of pleas and demurrers (to be argued) is made out, and set up in the Register's office, no addition or alteration shall be made therein.] N w entered with the Register. [Or. Ch. 52.]

[Where a defendant brought up from the Fleet, on an *alias habeas corpus* to answer a bill, put in a demurrer, without leave of the Court; the Court discharged and quashed the demurrer, and granted a *pluries habeas corpus*.] Habeas corpus.

[My Lord *Coke's* 4 *Inst.* 83. seems to think, that, where upon a demurrer, a bill is adjudged insufficient, the defendant shall have no damages; for they are given by statute 17 *R.* 2. *c.* 6. where the truth of the plaintiff's suggestion is tried, *&c.* which is not done upon a demurrer, where the fact is confessed.] Damages, Costs. [Px H Ch. 13.]

[The words of the statute are, that such *suggestions* be duly *found* and *proved untrue*.] Stat. 17 R 2. c. 6.

[But see 15 *H.* 6. *c.* 4. which, reciting that *subpœna's* are often had for matters determinable at common law, enacts, that, no *subpœna* be executed, till surety be found to satisfy the party grieved, his damages and expences; if so be, the matter cannot be made good, which is contained in the bill. And though this statute be not observed, as to the giving security; yet costs are always given. And so it is upon a plea; or dismission for want of prosecution.] Stat. 15 H. 6. c. 4.

[Where a suit appeareth upon the bill, to be of the nature of any of those, which are regularly to be dismissed, according to an order mentioned under title *Equity*, made in the time of my Lord *Bacon* (if I mistake not); the said order is to be set forth by way of demurrer.] Lord Bacon's order. [Toth. 54.]

[A demurrer is to be put in under counsel's hand, without oath. Wherefore, if a defendant take a dedimus to answer only, and return only a demurrer; an attachment will be awarded for want of an answer.] How filed.

—Vide *Commission to take an answer*.

Order to plead, answer, or demur.

2 P. W. 287.
3 Atk. 726.
1 Bro. 78.

Defendant has leave to plead, answer, or demur, not demurring alone; the defendant demurs, and answers only by denying combination; demurrer set aside. *Sed vide* 1 *Vern.* 463. and it seems that the order must be special, to *plead*, *answer*, or *demur*; for if it be only to answer a demurrer to part, and answer to the other part will not do.

2 Bro. 214.

Plea demurrer. Answer.

3 P. W. 80.
2 Atk. 282.
1 Vern. 90.
2 Atk. 389.

A defendant cannot demur and plead, or demur and answer to the same part of the bill, for the plea or answer over-rules the demurrer.

A demurrer cannot be good in part and bad in part, but must stand or fall together.

3 P. W. 326.

If a demurrer be to part of a bill, and an insufficient answer to the residue, yet the plaintiff cannot except, until the demurrer be argued.

When to object to form of the bill.

2 Atk. 137.

A defendant must take advantage of a defect in form in the plaintiff's bill by demurrer, it is too late to object after he has answered.

Answer.

3 Atk. 530.
2 Vez 110.

The Court cannot let a demurrer stand for an answer, because it is a mute thing. Nor can any thing be saved on a demurrer.

Demurrer how drawn.

2 Vez. 451.

The particulars demurred to should be distinguished in such manner, that the Court may see them without looking over the whole bill.

Speaking demurrer.

2 Vez. 245.

A demurrer cannot be to any thing, but what appears upon the face of the bill, else it would be a speaking demurrer.

Speaking demurrer.

4 Bro. 254.
2 Vez. jun. 83.

Where there is an argument in the body of a demurrer, such as in or about the year 1770, *which is upwards of* 20 *years before the bill filed*, it is a speaking demurrer, and bad.

Penalty waived.

1 Vez. 56.

Demurrer lies to a bill for discovery of an assignment of a lease, without license, if the bill does not expressly waive the forfeiture.

Second demurrer.

2 Bro. 66.

After a demurrer over-ruled, there cannot be a second demurrer. But if the bill be amended, then there may be another demurrer.

Discovery.

2 Atk. 394.

A bill will not do to discover, whether there is such a person, or where he is, in order only to make him a party to a suit in this Court, and a demurrer to such a bill was allowed.

Parties.

2 Vez. 312.

Defendant may demur if there be not all necessary parties to the bill. But the demurrer must shew who are the proper parties, not indeed by name, but so as

to

to enable plaintiff to amend, and this may be after demurrer argued. Hind. 152.

Though a defendant has not demurred to a bill, as being too trifling for this Court to entertain, yet he may take advantage of the objection at the hearing. Hearing. 2 Atk. 253.

Where, taking the charges in the bill to be true, it is clear that it must be dismissed at the hearing, it is good cause of demurrer. Hearing. 2 Ves. jun. 95.

Where plaintiff is entitled to a discovery, but not to relief, and there is a general demurrer to the whole bill. The demurrer must be over-ruled. But General demurrer. 2 Bro. 280.

Afterwards the Chancellor allowed such a demurrer, saying, that plaintiff ought to shape his bill according to what he had a right to pray. 2 Bro. 319.

Length of time since a transaction, which is the subject of dispute, is no ground for a demurrer, it is only a conclusion from facts, shewing acquiescence, and not matter of law. 3 *P. W.* 287. *contra.* Length of time. 3 Bro. 633. 3 Atk. 225.

Demurrer to a bill for redemption, because the defendant had been in possession twenty years, over-ruled: the fact not appearing on the face of the bill, but by averment in the demurrer. Length of time. Averment. 4 Bro. 254.

Where a bill seeks discovery of matter that the defendant is not bound to answer, he must demur; for where he submits to answer he must answer fully. Answer. 2 Bro. 252. 3 Bro. 238, 239. 4 Bro. 11.

Demurrer of another cause depending, over-ruled; the cause depending being such as would not be effective, and the present bill making new parties. Cause depending. 4 Bro. 60.

A general charge of combination to defraud, too loose; and as the bill did not connect the fraud alleged with the transactions stated, a demurrer was allowed. Combination. 1 Ves. jun. 287.

Where the plaintiff had stated a case upon which he might have drawn a declaration in ejectment, a demurrer was allowed; he might have had discovery, but he prayed relief, to which he was not entitled. Demurrer for want of equity. 3 Ves. jun. 343.

Bill stating plaintiffs to be judgment creditors in *Jamaica*, and that there were prior judgments and a conveyance of the estate to a trustee for fraudulent purposes, demurrer allowed, because the bill ought to have stated the effect of the judgment in *Jamaica*, for if it be the same with a judgment here, the lands may be taken by *elegit*; their being protected by prior judgments is no head of equity. How drawn. 3 Bro. 516.

Executor cannot bring a bill without shewing that he has proved the will, if he does, it is a good cause of Executor.

1 P. W. 75. demurrer, but it is enough to *allege* that he has duly proved the will.

Relief.
3 P. W. 148.
2 Atk. 157.

Bill for discovery and relief, defendant answers as to discovery and demurs as to relief, demurrer good.

1 Ves. 248.

Demurrer to the whole bill as to discovery and relief, if plaintiff be entitled to discovery the demurrer is bad.

1 Vern. 204.
2 Atk. 388.

Defendant is not compellable to discover any thing which is immaterial to the relief prayed.

3 Anstruther, 715.

A demurrer to the relief is over-ruled by an answer to the discovery of the facts on which the relief is prayed.

Where the bill is for discovery and relief, and the defendant demurs generally to both: by the Court—It is a demurrer to the relief as principal and to the discovery as consequent to it, and an objection applicable to the discovery only, as that it would subject defendant to penalties, is not competent upon such a demurrer.

3 Anstruther, 903.

Maintenance.
3 P. W. 375.

Defendant not bound to answer what tends to accuse him of maintenance, and a demurrer allowed.

Forfeiture.

Bill to discover whether a widow was married: she demurs, because the property was given over in case of her marrying again. Demurrer over-ruled, as it was a conditional limitation over of an estate; the widow must shew that she has performed the condition.

3 Atk. 260.

3 Atk. 453.457.

Defendant demurred because not obliged to discover that which would subject him to a forfeiture.

Demurrer to a bill for tithes, because it had not offered to accept the single value, over-ruled; the plaintiff being only the executor of a parson, and so not entitled to a forfeiture upon the stat. *Ed.* 6th.

1 Vern. 60.

Supplemental bill.

A supplemental bill against defendant, who was not party to the original bill, to answer the matters charged in the original bill. Demurrer, that defendant was no party to the original bill, and that there was no new matter stated in the supplemental bill to have arisen since the original bill.

3 Atk. 817.

Bill of review.

To a bill of review defendant pleaded the former decree, and insisted by way of demurrer that there was no error in it, and the Court being of that opinion, allowed the demurrer.

1 Vern. 393.

A man cannot bring a new bill of review after a demurrer to a former bill of review. Demurrer allowed.

1 Vern. 441.

Where a demurrer to a bill of review is allowed, it may be inrolled; but if over-ruled it cannot be inrolled, so as to prevent the demurrer being re-argued.

2 Vern. 120.

There

There is sometimes a demurrer for want of parties, sometimes a plea. A demurrer where it appears on the face of the bill, a plea where it does not. Parties. 1 Ves. 426.

Demurrer allowed to a bill for an injunction to stay a *mandamus*; so to an indictment, information, or prohibition. Injunction. 2 Ves. 397.

Bill by the obligee in the bond against the heir of the obligor alleging that he had assets by descent and ought to pay the bond. Demurrer allowed, the bill not stating that the heir was bound. 1 Vern. 180.

Demurrer to a bill for discovery in aid of the ecclesiastical court allowed: that court being able to compel a discovery itself. Ecclesiastical court. 1 Atk. 288.

Defendant demurred, because the plaintiff's bill was brought against several defendants for several distinct matters, but as defendant did not deny combination by his answer, the demurrer was over-ruled, but if he does more he over-rules his demurrer. Combination. 1 Vern. 416.

A demurrer to so much of the amended bill as had not been answered by the answer to the original bill, is bad. Anstruther 6.

To Interrogatories.

[IS a party or witness, his refusing to answer thereto, putting himself on the judgment of the Court, whether he ought to answer or no.] What.

[Said, if a defendant mean to demur to one or more interrogatories, he must have a commission so to do. In case of prosecution of contempt for breach of an order of court or otherwise, grounded upon an affidavit, the interrogatories shall not be extended to any other matter than what is comprehended in the affidavit or order: and if any other shall be exhibited, the party examined may for that reason demur to them and refuse to answer thereto.]

[So (I suppose) it is if an interrogatory contain a question that may put a party upon accusing himself of somewhat capital or criminal.]

[A witness demurred to an interrogatory, because he claimed interest in the land. It was disallowed, because he did not shew what interest and swear to it.] 2 Ch. Ca. 208.

A witness cannot demur, because the questions asked him are not pertinent, for it does not concern him to examine what may be the point of the issue. Witness. 1 Vern. 165.

DEPOSITIONS OF WITNESSES.

VIDE

Evidence.
Examination.
Witnesses.
Commission to examine.

What. [ARE their answers upon oath to such interrogatories as are exhibited and administered to them.]

How kept. [C. S. 32.] [They are to be kept private, and no copy or abstract of any of them delivered till publication is past.]

How kept. [Those taken upon commission are immediately upon bringing in to be delivered to the proper six clerk or his deputy, to be safely kept and without opening till publication be past, and those taken before the examiners to be safely kept by them; if they be not thus kept as of record by the proper officer, they are void, and not to be made use of either in this court or at law.] [Or. Ch. 137.]

Suppressed. Com. Att. [Depositions are not to be suppressed upon a bare petition only, without a reference to a Master, and a certificate upon it; nor upon motion without reference, except mal-practice or some great irregularity plainly appears to the Court.]

Suppressed. [Pr.H.Ch.157.] [A plaintiff at common law having caused witnesses to be examined in this court where there was no suit depending, their depositions were ordered to be suppressed, and never to be given in evidence against the defendant or any claiming by or under him.]

Depositions suppressed. [Px. Alm. 22. Or. Ch. 110] [No motion shall be made in court or by petition for suppressing depositions as irregularly taken, until the six clerks not in the cause have been first attended with the complaint of the party grieved, and shall certify the true state of the fact to the Court, with their opinion. If the attornies or clerks shall not, for the ease of their clients, agree before them; to which purpose a rule for attending the six clerks shall be entered of course with the Register, at the desire of the party complaining; which shall warrant their proceedings and certificate to the Court.]

[Where three witnesses examined by commission did, upon hearing the matter in open court, depose that the

the commissioners had set down their depositions otherwise than they did depose, the Court ordered those depositions should be suppressed, and these witnesses examined again.] [Cary Rep. 66.]

Deposition suppressed, because the attorney for the plaintiff had written down the whole in the exact form of the deposition before it was taken. Amb. 252.

Motion to suppress depositions, because they had been taken before the Master upon the same matter upon which the witness has been examined in chief, without a special order for re-examination, granted. 1 Bro. 388.

Depositions of witnesses *de bene esse* taken *ex parte* and without notice, which the Chancellor thought indispensable, suppressed. 4 Bro. 540.

If the Master reports interrogatories leading, all the depositions taken to them must be suppressed. Gilb. 148, 149.

If commissioners misbehave, or the commission be executed contrary to notice, or no notice be given to the parties, or the depositions returned, or so badly written or so interlined that they are not legible, the depositions may be suppressed, but the depositions are always brought into court by the proper officer, that the Court may see whether they are legible or not. Ibid.

Where interrogatories and depositions were suppressed, and then publication passed, the Court, to let in the party to the benefit of his witness's testimony, ordered interrogatories to be put in and settled by the Master for his examination over again. Prec. in Cha. 493. Gilb. Rep. 150.

[Where a witness's depositions on one side contradict his depositions on the other side, it is the course to order him to attend the Court, that he may explain himself and set the matter right if he can.]

Exemplifications.

[The Masters are not to pass any exemplifications of depositions on a bare sight of the copies only, without first calling the officer or officers who have custody of the records or originals of such copies, or some sworn clerk of his or their office who is to produce the same before them to warrant the signing thereof.] [Or. Ch. 118.]

Where undue copies of depositions have been delivered.

[By former order, either examiner may take out *subpœna's* against such as he shall probably suspect to have delivered undue copies of depositions to the adverse party, his clerk or solicitor, for the examining such offenders upon interrogatories, to be allowed of by a Master and to be executed before the other examiners; as also against any he conceives to be able to prove the abuse

abuse in case it be denied; and if, upon consideration of the answer to the articles, it be certified by such Master that the parties are faulty, as aforesaid, or in any thing of like nature, every person so offending shall be committed to the Fleet till he has given the examiners satisfaction. But if the parties acquit themselves upon their examination, and the examiner is not able to prove the same, he shall pay such costs as the Court shall think fit for unjust vexation.]

Gilb. 148, 149. [Ord. Cha. 62. 4.]

[And by an order of the 19th *Januarii* 1694—]

Copies of depositions.

[No copies of depositions are to be read or made use of in court, or before a Master, but what are taken out of the proper office and assigned for the party for whom the same are read: sometimes if one party happens not to have brought his copy to court the other will lend him his, and the Court will allow it to be read.]

[The examiners or their deputies have liberty to attend in court, to inspect all books of depositions which are read either for plaintiff or defendant, and to see whether they be duly signed for the party that doth produce the same, and in case the examiner shall discover any fraud or practice, the cause shall be put off, and the parties offending shall be committed to the Fleet till the officer injured be agreed with and paid his fees, and till *five pounds* be paid to such person as the Lord Keeper shall appoint for the use of the poor, and till the client, injured by putting off his cause, be reimbursed his charges in respect thereof, and till the further order of the Court.]

[Ibid.]

[Upon hearing, the Court (when in doubt) doth sometimes order witnesses to be examined *ad informandam conscientiam judicis.*]

[Cary Rep. 37.]

[Upon affidavit made by the plaintiff that since publication he had divers witnesses (by name) come to his knowledge, which he knew not of before; the Court ordered that he might examine them before the examiner, *ad informandam conscientiam judicis.*]

[Cary Rep. 83.]

[Depositions of witnesses examined only to inform the conscience of the Chancellor, are to be delivered to him sealed, that he alone may peruse the same; nor are they ever published but by consent or special order.]

[Toth. 23.]

Taken in one cause, read in another.

[Said, the reading of depositions taken in a cross cause must be by precedent order, upon motion.]

Where

Where the question is the same and the defence the same in two causes between the same parties, depositions taken in one cause may be read in the other, 2 Vern. 447. 3 Atk. 502.

Originall bill for relief, defendant made a full defence, witnesses were examined and a decree against the defendant; the defendant brought a cross bill afterwards, touching the same matters and examined other witnesses, for the same matter put in issue by the answer in the original cause, which was objected to as an inlet to perjury, and Lord *Hardwicke* refused to hear the evidence in the cross cause touching the matters in issue in the original cause, but allowed any of the depositions in the cross cause to be read not relating to the matters put in issue in the original cause. 3 Atk. 501.

Motion, that depositions in the cross cause might be read on the account directed in the original cause, for though the cross bill was dismissed, that does not vary the truth of the depositions: granted. 2 Ves. 579.

Depositions of co-defendant read for another defendant, where the Court thinks there is no material evidence against that co-defendant from the nature of the fact affecting him, or from the credit of the witness who has sworn it. 2 Ves. 224.

Upon an account before the Master, the plaintiff offered to read as evidence the depositions in a former cause wherein the plaintiff and defendant were parties, which the Master refused unless an order was obtained for that purpose; and upon motion for such order Lord Chancellor said that such applications caused unnecessary expence, and that the proper way was to except if the Master was mistaken and he refused the motion. 3 Atk. 524.

[Where either plaintiff or defendant obtains an order to use the depositions of witnesses taken in another cause, the adverse party may use the same without motion, unless he be, upon special reason shewn to the Court by the party first desiring the same, prohibited so to do.] [Or. Ch. 109.]

Depositions in a former cause cannot be read in another cause against a party who does not claim under the person against whom they were taken, unless by special order; but if a legatee brings a bill against an executor and proves assets, another legatee, though no party, may have the benefit of those depositions. 1 Vern. 413.

A witness was examined whilst she was interested before the hearing, and the cause being heard and sent to an account, she was re-examined after the hearing before Witness interested.

2 Vern. 464. 472. 699.

fore the Master on the account, having first released her interest. Her depositions before the Master allowed to be read.

1 P. W. 289. 2 Atk. 615.

Where a witness is examined who at the time is disinterested but afterwards becomes interested and plaintiff in the cause, yet his depositions shall be read.

Death of witness. 1 P. W. 414.

Where a witness dies after examination, but before he has signed such examination, they cannot be made use of.

But where a defendant after publication examined a witness, and then conceiving himself irregular in examining this witness, it being after publication, got an order (upon petition and affidavit of himself, his clerk in court, and solicitor, that they had not nor would see any of the depositions) that he might re-examine the said witness, but before she could be re-examined, she died, and the Court ordered that the former depositions of this witness might be used.

1 P. W. 414, 415.

Reflecting words. Costs. 2 P. W. 406.

A witness swears reflecting words upon ——, as that he was a vexatious man and a stirrer up of suits, &c. yet he ought not to pay costs for it, as it is the commissioners fault for taking down the depositions. *Quære* if the interrogatory had led to it, which it did not.

Deposition amended. 2 P. W. 647.

A deposition of a witness amended after publication where it is clear that the examiner was mistaken in taking it down, or the witness in making it.

Reference to a deed in a deposition. 3 P. W. 34.

Defendant's witness proves a deed and refers to it in his deposition, the plaintiff cannot compel the defendant to produce the deed at the hearing, the reference thereto not making it a part of the deposition. *Vide* 3 *P. W.* 364.

Depositions not to be read concerning a matter not directly in issue.

Bill by wife for maintenance, suggesting ill usuage by the husband, and on the part of the defendant, as an excuse for his ill usage, depositions were offered to prove a criminal conversation; unless it *is expressly* charged by the answer, depositions cannot be read, and stating that she behaved in an indecent manner was not thought a sufficient charge to entitle the husband to read evidence of criminal conversation. But it is sufficient to put in issue a general charge of lewdness, and under this may be given particular evidence, but then it must be pointed and applied to the general charge.

2 Atk. 96.

2 Atk. 333, 338.

Scandal, &c. 2 Atk. 235. 3 Atk. 557.

The Court will order depositions to be referred for scandal and impertinence to a Master to be expunged. *Sed quare* for impertinence only.

Where

Where publication is passed and the depositions are copied and delivered out, either party is at liberty to examine to the credit and reputation of any of the witnesses, the party objecting must file *articles* in the examiner's office, which contain the substance of the objections he makes to the reputation of the witnesses; the articles being filed and a certificate of that fact being obtained from the examiner, the Court on motion or petition will give leave to the party to examine witnesses thereon to prove the truth of the articles; the adverse party, who is to support the credit of his witness, is also at liberty to examine *toties quoties*, and the depositions taken upon this occasion must be published as in other cases, but objections of this nature are very seldom made, and generally speaking they end in nothing but putting the party to useless expence.

Examination to credit of witnesses.

Gilb. Chan. 147, 148.

When the depositions are thus copied and delivered out, and both parties come to see the interrogatories exhibited by each, if the same be leading, impertinent, or scandalous, this is the proper stage of the cause to refer them to a Master to certify whether the same be so or not; this reference is obtained by petition or motion of course.

For the method of obtaining attendance before the Master, vide *Gilb. Chanc.* 147, 148, and 2 *Harr.* 512. Ibid.

[Said, though a cause be dismissed upon hearing, yet may the parties have the depositions exemplified under the great seal, for the furtherance and maintenance of their rights and titles a common law.] [West. fol. 45.]

Vide Exemplification.

DISCLAIMER.

[IS where the defendant upon oath, by answer, denies he hath or claims any right or title to the thing in demand by the plaintiff's bill, and disclaims, *i. e.* renounces all claim thereto: in which case, if it appear that the bill was exhibited for vexation only, the Court will give costs against the plaintiff; but if the plaintiff had probable cause or reason to exhibit his bill against such defendant, he may, if he pleases, pray a decree against such defendant and all claiming under him since the

What.

Original with certain [illegible] as 1740 [illegible] ante

[Pr.H.Ch. 11.] the bill exhibited, and it is commonly granted without costs on either side.]

Costs if plaintiff replies.

[Where the defendant disclaims, the party is not to reply; if he does, and serves the defendant with a subpœna to rejoin, the defendant may have costs against him for the vexation.]

[3 Px. Alm. 61. 3 Atk. 582.]

Evidence.

Where a title is set up to an estate by bill, and the defendant disclaims and you do not bring him to hearing, you shall not read his evidence as a proof of your own right, to the prejudice of another defendant.

2 Atk. 39.

Replication.

If the disclaimer be only to part of the matters in question, but as to the other part, there is a plea or answer, in that case there may be a replication to such part as contains the plea or answer.

Cur. Canc. 133.

After disclaimer, defendant upon motion may be examined as a witness in the cause.

Cur. Canc. 133.

The defendant ought regularly to wait three terms after his disclaimer before he moves for costs, because plaintiff may amend his bill and get a decree upon the ground of the disclaimer; otherwise if defendant moves for costs, he ought to give notice.

Hind. 209.

A disclaimer being in point of form, an answer, the words of course preceding and concluding the one, are pursued in regard to the form of the other.

Hind. 209.

A defendant may demur to one part of a bill, plead to another, answer to another, and disclaim to another; but all these defences must clearly refer to separate and distinct parts of the bill.

3 P. W. 80.

A defendant cannot by answer claim what by disclaimer he has declared he has no right to.

Mit. Treat. 254.

DISMISSION AND RETAINER.

VIDE

Decree.
Equity.
Jurisdiction.

What.

[A Dismission is a final sentence of the Court, whereby the plaintiff's bill or suit is ordered to stand dismissed.]

[A dis-

[A dismission is sometimes for want of filing a bill upon a *subpœna*: sometimes upon the defendant's answer and disclaimer: other times it is on plea or demurrer to the bill; or for commencing and proceeding in a suit at common law for the same matter, pending the suit here: or upon hearing of the cause: or by the plaintiff's doing somewhat which seems making himself a judge of the matter in question: or upon the prayer of the plaintiff himself.] What.

[Dismission upon hearing is sometimes for want of parties, or because the matter belongs to another *forum*, as to the courts of law, or ecclesiastical courts; or that the cognizance of the cause belongs only to another court of equity, or that the matter in demand is below the dignity of this Court, either in respect of its value or in respect of its nature; which last is such as in itself is dishonest, or that is ordinarily accompanied with something of fraud, corruption, or oppression, or hath an evil tendency; as well as upon the merits or for want of equity in the cause. Vide *Equity*.] Upon hearing.

[If it be upon full hearing and drawn up, signed, and inrolled, it may not be altered by any motion or order afterwards for retaining the cause; but by a bill of review. Nor shall a new bill be admitted but upon new matter, (like as the case of a bill of review,) and special order of Court.] [3 Px. Alm. 12, 13. Px. Alm. 27. Toth. 50]

[But if the dismission were for want of prosecution and not on the merits of the cause; then sometimes on motion and excuse of the delay in proceeding, and paying costs, the plaintiff's bill by special order is retained, or he has leave given him to exhibit a new one: the doing of which is merely at the discretion of the Court.] For want of prosecution. [3 Px. Alm. 12. Com. Ast. 28.]

[If the dismission be upon hearing, the plaintiff ordinarily pays full costs, to be taxed.] Costs.

[If it be upon disclaimer, plea, or demurrer, seven nobles costs are to be paid;] *but this must be before argument upon the plaintiff's submission.*

[If the plaintiff dismiss his own bill, or the defendant dismiss it for want of prosecution, the plaintiff must by the late statute 4 *Annæ Reginæ*, for amendment of the law, pay full costs to be taxed by a Master.] [4 Ann.]

If after answer the plaintiff does not proceed in three terms, the defendant may move (as of course) to dismiss the bill for want of prosecution with costs to be taxed, For want of prosecution.

2 Harr. 605. taxed, he must produce the six clerks' certificate of filing the answer and of no proceedings since.

Where a plaintiff is prosecuting some or one of the defendants for want of an answer, another defendant who has answered shall not move to dismiss the bill.

2 Harr. 606.

After joining in commission, the defendant cannot move to dismiss the bill for want of prosecution, because he is then able to proceed himself to examine witnesses and after publication may himself set down the cause to be heard.

2 Harr. 607.

Dismission on bill and answer.

Ord. Can. East. Apr. 27, 1748.

2 Atk. 289.

Where a cause is set down upon *bill and answer only*, or where it is set down after withdrawing a replication, it is in the discretion of the Court, according to the merits of the case, to dismiss the bill with 40 *s.* costs, or costs to be taxed by a Master, or with no costs.

If a plaintiff obtains an order to amend his bill, which he does not do in a reasonable time, yet he shall not by such a proceeding keep his bill on foot and hinder its being dismissed for want of prosecution.

2 Harr. 609.

Costs.

[Cl. Tut. 21.]

[Where the defendants defend the suit severally, (*i.e.*) by several clerks, costs must be paid them severally.]

Bill not filed in time.

Costs.

[Where several defendants are served with process to answer and the plaintiff does not file his bill against them in time, they may be dismissed the Court with costs; so may any served with process if he be not made a party defendant in the bill.]

For want of prosecution.

[Com Att. 444. 1 Px. Alm. 27.]

[Where the plaintiff discontinues his prosecution three whole terms after that wherein all the defendants have answered (the six clerk certifying the same), the cause may be dismissed of course, upon motion.] Vide *Replication.*

[If plaintiff replies soon after the answer comes in, a dismission is not to be moved for till *four* terms after the replication put in, and that in case there have been no proceedings afterthe replication, either by motions, references, examination of witnesses, or the like.]

[Toth. 52.]

[But if the plaintiff delays replying till the *third* term, or so long that there is reason to think he affects delay, the Court will upon certificate and motion order him to speed his proceedings, or that his bill be dismissed.]—*Now however* it seems to be the practice that after replication, if the plaintiff ceases all manner of prosecution for three terms exclusive, the bill may upon the six clerks' certificate, and notice upon motion and affidavit thereof filed, be dismissed.]

2 Harr. 609.

Before replication it is not necessary to serve a notice of motion. Notice of motion. [Harr. 609.]

[After appearance and before answer, or after answer and before the parties have examined witnesses, the plaintiff may generally, of course on motion, have leave to dismiss his own bill with costs; but after witnesses examined, it is not to be prayed except it be upon special cause: after a decree to account, and the plaintiff to pay: *&c.* or such like, the Court will not suffer him to dismiss his own bill.] Plaintiff may dismiss his own bill. [1 Ch. Ca. 40.]

After a general demurrer put in but not argued, and no proceedings afterwards, *defendant* cannot dismiss the bill for want of prosecution as he had an equal power to *move*. After demurrer not argued. 2 Ves. jun. 287.

One co-plaintiff may dismiss his bill as against himself with costs without the consent of the other co-plaintiffs, and the Chancellor said it was a motion of course. Bathew v. Needham. Sittings after Hil. 1797.

[If the plaintiff disavows or disowns the suit, the bill shall be dismissed without costs against him, upon notice of the motion to the defendant, if he shew no cause to the contrary.] When plaintiff disavows the suit.

[The plaintiff may either come into court and disavow the suit, or by warrant to counsel under hand and seal disown and disclaim it, as being brought without his order or privity, or against his order though with his privity, and may empower some counsel to move and consent that the bill be dismissed.]

[The Court in case of such warrant, orders it to be filed in court.]

[If in such case there be more plaintiffs than one, the bill will be dismissed only as to him who disowns the suit.]

[A dismission is not to be moved for by the defendant upon the matter of the plaintiff's bill before a demurrer, plea, or answer be put in thereto by the defendant.] Before answer, &c. [3 Px. Alm. 13.]

[For vexation by a double proceeding, a cause may be dismissed.] Action at law and suit in equity. Election.

[As if the complainant first brings an action at law and then his bill here for the same thing, (in effect) he has election either to proceed here (his proceedings at law not being stayed by order or injunction), or to go on at law and be dismissed here, (with costs to the defendant,) but will not be suffered to proceed in both;

[Pr. Alm. 12. Toth. 52] if the defendant move the Court herein,] *but cannot be put to his election till after answer.*

3 P. W. 90. [Though the bill be so dismissed, yet if afterwards plaintiff choose to proceed here and apply himself in time, the Court will ordinarily, upon paying the defendant his costs at law and of the dismission here, retain his bill.]

2 Verd. 32.

Election. An order for plaintiff to make his election was discharged on motion, the defendant having pleaded the stat. of limitations, and the plea not having been argued.

Mosely, 210.

Plaintiff filed his bill in the Exchequer, which was dismissed, and then brought the same bill into this court *after* the defendant had pleaded, it was referred to the Master to see whether it was the same bill or not. But if two bills are depending here for the same matter, the defendant may move that it may be referred to a Master to see whether they are the same, and to dismiss one.

Mosely, 268.

Plaintiff may either make a general election to proceed at law or a special election, as to proceed for part here and the other part at law, but the Court will judge of the reasonableness of that special election.

Gilb. Rep. Eq. 183.

The order for making an election recites only that the plaintiff prosecutes the defendant at law and in equity for one and the same matter, so that the defendant is doubly vexed; wherefore it provides that the plaintiff, his clerk in court, and attorney at law, having notice of the order within eight days after such notice, make his election in which court he will proceed; and if he elects to proceed in this court, then the proceedings at law are by that order stayed by injunction; but if the plaintiff shall elect to proceed at law, or in default of such election by the time aforesaid, his bill is to be dismissed with costs.

2 Harr. 615.

It is a motion of course to put a party to his election to sue at law or in equity.

1 Ves. jun. 91.

And note; if one makes a special election to proceed at law as to part and in equity as to other part, with regard to what the plaintiff in equity elects to proceed at law for, his bill ought to be dismissed with costs.

2 Harr. 615.

Plaintiff entering upon the lands in question pendente lite, dismissed.

[If the complainant *pendente lite* in this court enter into lands in question, or do any such like thing, he shall be dismissed for so much; because he thereby in some sort takes upon himself to be judge in his own cause,

cause, and renounces the judgment of the Court, but for other matter in his bill (if any) he may proceed.] [3 Px. Alm. 72. 7.]

[Where the bill is regularly dismissed of course, or by order, no motion will be admitted for retaining it without certificate from the defendant's clerk in court, that the costs of the dismission are paid, to the end unnecessary charge to the parties, by several motions for one and the same matter, may be avoided. Retainer after dismission. Or. Ch. 118. 1 Px. Alm 17.

[No dismission or retainer after dismission will be granted upon a bare petition only.] Retainer after dismission. [Com. Att. 441. 287.]

[Upon a dismission of a bill here, whilst the defendant prosecuted at law upon a bond, this Court refused to give him his costs at law, because he should have them there.] Costs at law.

[But for proceedings at law to try an issue or such like by order of this Court, the party shall have his costs at law allowed, with his costs in this court.]

[Said, upon a dismission with full costs, you get them taxed by a Master to whom the taxation is referred and have his report; and then without confirmation of his report you have a *subpœnâ* for them; upon which if they be not paid you then have process of contempt as in other cases.] Subpœna for costs after report.

[A schoolmaster was dismissed because he could not make out that he was duly chosen, *&c.* as a trust directed; but in regard, that under the notion and supposition of being a master of the charity-school he had taught four years *gratis* near where the other master taught, and so might be supposed to ease him; and that the plaintiff had also lately been in prison and was poor; the Court spared costs against him, but said if he came again by rehearing, *&c.* he should smart.] Costs.

[Probable cause of suit will ordinarily weigh with the Court and incline to spare costs, where the plaintiff is dismissed on hearing.] Costs.

Plaintiff cannot upon motion dismiss his bill *without costs*, upon the ground that from the facts disclosed by the answer the Court would have decreed according to the prayer of the bill. 1 Vez. jun. 140.

[In case of any dismission which was not upon hearing the cause, if any new bill be irregularly brought, the dismission is to be pleaded, and after reference and report of the contents of both suits and consideration of the cause of the former dismission, the Court is to rule Dismission pleaded to a new bill.

[Toth. 51.] and order the retaining or dismission of the new bill, according to justice and the nature of the case.]

Costs. [A cause being ended, leave was given the plaintiff to dismiss his bill without costs.]

[So where a feme sole plaintiff married before witnesses examined.]

Petition. Motion. [Said, leave to dismiss a plaintiff's own bill may be had on petition or motion.]

Costs. 1 Ves. jun. 140. 402. Plaintiff can in no case dismiss his bill without costs but upon consent, with costs he may always dismiss his bill.

Bill dismissed without plaintiff's privity. If without his privity a bill be dismissed as of the plaintiff's own prayer, the Court on complaint, &c. will not only retain the bill, but order the abuse to be examined into and punish it.

EQUITY,

What. [IN many cases, aids a man against the rigour of the common law, and gives relief where the law will not or cannot.]

[*Æquitas sequitur legem.* This rule seems to hold place where a case falls under the letter of a law, which is not against the law of God or the law of reason; and there are no particular circumstances in the case to sence it out of the general intent of the law: or it may be, that hereby is meant, equity in its determinations, keeps as near analogy to the rules of the law, and follows them as closely as reason and good conscience, will permit.] Doct. and Stud. 85. 135.]

[The common law relieves not particular cases against a general rule, but equity often doth, so as the example do not introduce a general mischief; for in equity each case stands rather upon its own particular circumstances, than upon generals.] [2 Ch. Ca. 93.]

[Though the common law takes no notice of a chose in action, yet this Court does in most cases, and orders the conscience of parties accordingly; so of assignments or other conveyances of things in trust.]

[He that hath only a title in equity shall not prevail against him that hath title both in law and equity.] [2 Ch. Ca. 213.]

[No

[No decree is ordinarily to be made upon pretence of equity against the express provision of an act of parliament.] [Toth. 43.]

[But if the construction of an act hath for a time gone one way in general opinion and reputation, and after by a latter judgment hath been controlled; then relief hath been given upon matter of equity, for cases arising before such judgments, because the subject was in no default.] [Toth. 43.]

[He that will have equity, must do equity.]

[Said, if a man by his own act disable himself to do a thing which is for his own benefit, he shall neither be relieved in law or equity; but this is to be understood with some limitations.] [Cl. Tr. 19. 3 Pr. Alm. 50.]

[Said, he that purchaseth after a bill exhibited here against the vendor, doth it at his own peril.] [2 Ch. Ca. 223.]

[By ancient orders, suits grounded upon nuncupative wills, long leases tending to establish perpetuities, estates with remainders over to the crown to defeat purchasers, or for brocage or rewards to make marriages, or agreement at play or wagers, bargains for offices contrary to the stat. of *Edw.* 6th, or upon contracts for usury or simony, are regularly to be dismissed upon motion if they be the whole matter of the bill, and there lie no special circumstances to induce the Court to allow them a procedure;] *but this is not now the practice to dismiss by motion upon the merits.* [Toth. 51.]

[No remedy is given here where the remedy is at common law.]

[But this hath some exceptions, as where you may have damages at the common law, yet if you like a specific performance better, you may in some cases have it decreed here.] Vide *Fonblanque's Treat. on Eq.* 139.

[*Nudum pactum* ought to have no more help here than at common law, nor is there any relief against one that hath waged his law, though peradventure he did it falsely.] [Cary. Rep. 7.]

For more under this head, *vide*

Mitford's Treat. on Eq. Introduction.

Fonblanq. Treat. on Eq.

ERROR.

VIDE

Infant.
Bill of Review.
Decree.

[MATTERS assigned for error in a decree must appear in the decree itself.]

[If a decree or any part of it be in the nature of things impossible, it is erroneous, and will be reversed on a bill of review. So if it be repugnant.] [1 Ch. Ca. 87.]

[An account was decreed, pending which, the suit abated; the account was carried on, finished, confirmed, and decreed, the decree inrolled; yet this upon a bill of review was held no error or cause of reversal.] [1 Ch. Ca. 122.]

[Several co-incident causes being brought to hearing at the same time a decree past against one, who, though a party in one of the bills, yet was not one in the bill to which some part of the decree, affecting him, related; and this, upon a bill of review was held no error.] [2 Ch. Ca. 234.]

[The Court would not reverse a decree for want of form, or for mistaking an account which might be helped by a Master.] [Cl. Tut. 16.]

[Decrees made in inferior courts may by bill here be re-examined; and affirmed, or reversed, as the Court sees cause.] 3 Pr. Alm.

EVIDENCE AND PROOFS.

VIDE

Depositions.

Copies of depositions.

[THE copies of all depositions of good witnesses regularly taken in the cause after answer, and duly kept, published, and signed, may ordinarily be read as evidence at the hearing.]

Contrarieties in depositions.

[But if it appears a witness has deposed falsely in part, as where his depositions contain manifest contrarieties in

in any material point, his depositions are wholly to be rejected.] [Pr. H. Ch. 18. Cl. Tut. 16]

[If there be several suits here which are merely cross-causes between the same parties, touching the same matters, the depositions taken in one cause may (by order) upon hearing be used in the other.] Depositions in one cause read in another. [Px. Alm. 23.]

Defendant moved to be at liberty to read depositions in this cause, which were taken in a cause in which plaintiff's father was a party, the suit being in all matters the same; but the plaintiff not claiming as heir and his father being only tenant for life, these depositions could not be read against him, because he did not claim under the person against whom these depositions were taken. 1 Vern. 423.

But said, if a legatee brings a bill against the executor and proves assets, another legatee, though no party, may have the benefit of those depositions. 1 Vern. 413.

[Where there were cross-causes, publication being past in the first but not in the second, an order was had that the depositions in either cause might be used in both; yet said, the depositions in the first could not be read in the second cause.] [1 Ch. Ca. 236.]

[Said, where a bill cannot be read at law, the depositions in the cause cannot be read either there or in this court.] Depositions read at law, and in any other cause. [1 Ch. Ca. 175.]

[Wherefore if a bill be dismissed for irregularity, as that the party comes by revivor, when he should come by original bill; so that in truth there never was regularly any such cause in court, and consequently no proofs. The depositions in the cause cannot be used, for the bill cannot be exemplified nor used at law.] [1 Ch. Ca. 175.]

Where a person has been examined here, his depositions may be read at law in a cause between the same parties, if it can be proved that the witness is dead, or by reason of sickness, &c. is not able to travel, or is out of the kingdom, or otherwise not amenable to the process of the Court. 1 Atk. 445.

[But if a cause be dismissed because the matter be not proper to be decreed, yet the testimony of a fact proved in such cause may be used as evidence to that fact between the same parties whenever it shall come in question again.] [1 Ch. Ca. 175.]

[Said, if it appear to the Court that there has been a bill and answer, though they be gone off the file, yet the

the Court will allow depositions in that cause to be used in another.]

Disability in a witness cured examination. [Cl. Tut. 9.]

[Admitted, if a witness be surety here in court, or otherwise disabled to be a witness, yet if both parties examine him, neither can afterwards object against trending him.]

One witness. [2 Ch. Ca. 8.] Prec. Cha. 19. 1 Vern. 161. 2 Att. 19. 2 Atk. 140. 3 Atk. 407. 1 Bro. 52.

[Where the defendant by his answer denies an agreement alleged in an original bill, one witness will not be sufficient to prove it, for that is but oath against oath.]

2 Vez. jun. 244. 3 Vez. jun. 170.

But the evidence of one witness, corroborated by circumstances, though to facts denied by the answer, is sufficient to ground a decree.

[If husband and wife executrix answer severally, he denies the trust, she confesseth it, one witness is not enough to prove it.]

[Cl. Tut. 6.]

[If a defendant in an answer do affirm a thing which he seconds by the testimony of a single witness and nothing is proved against it, this is sufficient to decree for the defendant or to dismiss the bill.]

Deeds, letters, &c. Exhibits. [Pr. Alm. 23.]

[All letters, notes, deeds, copies of records, and other exhibits proved by the depositions, may be read at the hearing.]

[Cl. Tut. 15.]

[And though they stand proved in the depositions, they must be shewed forth in court, if the party will have any benefit of them in evidence.]

Proved vivâ voce.

Deeds and copies of records not proved may be special order of court (had upon notice and motion be proved *vivâ voce* at the hearing.

[Pr. H. Ch. 19.]

[(But not letters or notes.)]

Evidence.

[And so they may at a rehearing, but nothing besides the executing of them.]

[And in either case they must be particularly mentioned in the order.]

[Cary. Rep. 43.]

[Held, that oath of having seen such a deed is not to be allowed as proof thereof, for it might be forged; but the oath should be that he saw it sealed and delivered.]

Evidence.

[A licence to a schoolmaster to teach, granted by the bishop's chancellor, under seal, during the bishop's suspension, hath been allowed to be read as evidence.]

[Pr. H. Ch. 19.]

[No witnesses *vivâ voce* are allowed at the hearing, except by special order.]

Depositions in a former cause read. [1 Ch. Ca. 175.]

[Depositions in a former cause between the same parties may be used by special order, and the adverse party may then also read them on his part.]

Depositions in a cause to perpetuate testimony.

[Depositions in a cause to perpetuate the testimony of witnesses shall not be made use of or given in evidence

dence against any other than the defendants who were subpœnaed to defend it, or some claiming by or under him or them on interest which accrued after the bill preferred.] [Px. Alm. 4. Toth. 189, 190, 1, 2.]

[The examinations of witnesses after appearance and before answer is only *de bene esse*; yet if any of them die before the defendant has answered, their depositions shall ordinarily be made use of either here or at law, else not.] Examination de bene esse. [Px. Alm. 22.]

[The proofs made before answer upon a *certiorari bill* are not to be made use of at hearing, for they are only to give the Court jurisdiction, and the defendant could not then examine any thing on his part.] Certiorari bill. [Pr. H. Ch. 8.]

[If a witness refuse to be cross-examined, it is good cause of exception to his depositions.] Refusing to be cross examined. [Ch. Tut. 9.]

[A witness twice examined in chief by the same party in the same cause, without special order, is not to be allowed or read at hearing.] Witness twice examined. [P. H. Ch. 18.]

Plaintiff, under an order to prove a deed *vivâ voce* at the hearing, produced a witness to prove the hand writing of witnesses to the deed, who were all dead; but not allowed; however, he had liberty to examine in the office to prove the deed though publication had passed and the cause stood over for that purpose. Death of witness. Examination vivâ voce not allowed to prove his handwriting. Pr. Ch. 64.

In case a witness who has been examined at a former trial of an issue between the same parties, and who has been examined in the cause, dies, not only his depositions may be read, but what he has sworn at a former trial may be given in evidence. Death of witness. Depositions and what he proved at a former trial read. 2 P. W. 563.

[Depositions in an ancient cause between other parties, are sometimes allowed to be read, even against one that claims not under any of those parties; *but the cause was thirty years old and the witnesses dead.* Vide, *however*, 1 *Vern.* 413. *contrà.*] Depositions in a former cause read. [1 Ch. Ca. 73.]

[Held, a defendant (not being a principal one) examined for the plaintiff in another suit between other persons, might be read as a witness.] Cary, 29.

[Depositions in a cause between *other parties* though touching the same matter are not to be read without special order.] Pr. H. Ch. 18.

[Nor depositions in other courts without such order; nor then, any of those that were taken after publication past here.] [Ibid.]

[Where either plaintiff or defendant obtains an order to use depositions in another cause, the adverse party may

may likewise use the same without motion, unless he be, on special reason shewed to the Court, inhibited by the same order so to do.

Or. Ch. 109.

Certificate of character.

[A certificate of a party's character under several persons hands which were proved to be so by a deposition, was not allowed to be read as evidence, because the certifiers might have been examined to the party's reputation.]

Husband and wife.

[Said, a man and his wife are considered but as one witness.]

Cl. Tut. 9.

Husband and wife.

Baron and feme defendants to a bill; the feme must answer, though the answer cannot be read against the husband, but may (possibly) be read against her, if she survive.

3 P. W. 236.

Infant.

But an infant's answer, cannot be read against him, because it is not the infant's answer but the guardian's, who is sworn and not the infant.

3 P. W. 237.

Where a defendant puts in an answer to an infant's bill and it is not replied to, the answer (as it seems) must be taken to be true; the defendant being prevented by the want of a replication from examining witnesses to prove his answer. *Contrà* 2 *Atk.* 377.

3 P. W. 237.

Admission in answer.

[If one defendant by answer confesses sufficient matter for the plaintiff, it shall bind himself; but is not ordinarily sufficient evidence to conclude or bind his fellow defendant.]

[Pr. H. Ch. 20. Toth. 10.]

Answer in the spiritual court.

A man's answer in the spiritual court may be read against him in this court.

1 Vern. 53.

One defendant against another.

Regularly the answer of one defendant cannot be read against another defendant, but when the answer of one refers to the answer of another, such answer may be read.

2 Vez. 629. 2 Vez. jun. 11. 1 P. W. 300.

Disclaimer.

Where a defendant disclaims all right, you cannot read his evidence as a proof of your own right to the prejudice of another defendant.

2 Atk. 39.

[Held that a bill in a former cause in the name of the now defendant was not to be read as evidence against him, unless it were proved to have been exhibited by his direction or privity.]

[1 Ch. Ca. 65.]

Subpœna to rejoin.

[Though a subpœna to rejoin be sued out, yet if it be not served, no proofs are to be made use of at hearing, but the cause must be heard on bill and answer.]

Proofs of matters not in issue.

[Proofs or evidences of matters not in issue which go to the very right of the thing, may be offered at hearing; and though the Court will not decree upon matter not in issue,

issue, which the other had not an opportunity of examining to; yet it will not decree against what it sees to be the mere right, but will sometimes order that matter to be tried by an issue at law, &c. and decree thereupon.] [2 Ch. Ca. 3, 196]

[Said, the depositions of new witnesses upon a bill of revivor, after publication, may not be read in this court; but an issue having been directed and the witnesses aged and infirm, the Court may according to the prayer of the bill of revivor, give leave that they be examined, and that their depositions may be used in the trial, in case the witnesses die.] [1 Ch. Ca. 86.] New witnesses upon bill of revivor. After publication.

[Depositions in the Admiralty have been read here at hearing.] [Toth. 192.] Depositions in the Admiralty.

[Shop-books have sometimes been allowed to be read as evidence at hearing.] [Toth. 91.] Shop books.

But not where the entries are in a man's own hand, though entries by servants after their death are allowed. 2 Vez. 43.

Exemplification of part of a patent not suffered to be read in evidence, notwithstanding the statutes 3d and 4th *Edw.* 6th, and 13 *Eliz.* where the other side has no time to consult the patent roll, and so may be surprised by an imperfect exemplification. Exemplification. Patent. Prec. Cha. 60.

Counterpart of a settlement has been admitted sufficient evidence of a settlement. Counterpart. 2 Vern. 380. Prec. Ch. 117. S. C.

Depositions taken in a cause when tenant in tail is party cannot be read against the issue in tail. Tenant in tail. Prec. in Cha. 212.

This Court will allow the proving of exhibits *viva voce* at the hearing, but not to let in other examinations, and this only at the application of the party who is to make use of the exhibits, but no instance where it is allowed at the application of the contrary party. Exhibits. 1 Atk. 444.

Where an original note is lost and a copy of it is offered in evidence, you must shew sufficient probability to the Court that the original note was *genuine* before you will be allowed to read the copy. Copy. 1 Atk. 446.

A plaintiff in a cause cannot be made a witness, for plaintiff is liable to costs if the suit miscarries; but a defendant may be a witness, for he is forced into the suit. Plaintiff witness. Gilb. Eq. R. 98. Prec. Ch. 411. S. C. 2 Vez. 222.

Where a witness is examined, who afterwards becomes interested and plaintiff in the cause, his depositions shall be read. Plaintiff witness. 1 P. W. 288.

The

Superannuated person.

Prec. Ch. 229.

The answer of a superannuated person put in by guardian shall be read against him, as an answer of one of full age; *secus*, of an infant who is to have a day to shew cause.

Release.

A witness being interested, may on a release being given him whereby he becomes disinterested, be examined again. A witness rejected to be read at the hearing, because interested; yet on a release being given, was examined again on the account, and allowed on exception to the Master's report.

Prec. Ch. 234. 2 Vern 472. S. C.

Examination.

2 Vez. 524.

Where a cause stands over to add parties and on amendment publication is open, all the parties may enter into a new examination, and the new examination read against another defendant.

Witness interested.

3 Bro. 228.

Witness had been examined, and upon suspicion of his being interested, an issue was directed to discover his interest, and it was thought that the Court might have ordered an interrogatory to be exhibited to him in the nature of a *voir dire*.

Re-examination. Mistake.

3 Bro. 370.

Witness re-examined where there has been a mistake; on special application and the mistake apparent.

Decree.

2 Vez. 90.

Decree where present plaintiffs and defendants were parties, read as evidence, though not conclusive.

Bankrupt.

1 Bro. 269.

The evidence of a bankrupt who has had his allowance and certificate, allowed to be read.

Affidavits.

3 Bro. 463.

Affidavits read *against* the answer, upon an application for an injunction to restrain execution on a verdict at law. *Sed quære.*

Interested witness.

1 Vez. jun. 61.

No objection to the evidence of a man on account of interest, if he cannot recover any thing in the suit.

Parol evidence.

Amb. 127.

Where a resulting trust is insisted on in opposition to the legal operation of a will, parol evidence is admitted to rebut that equity.

Amb. 247.

Parol evidence admitted to prove the destruction and contents of a deed.

Evidence dehors the deed.

Amb. 147. 2 Vez. jun. 417.

Articles previous to a settlement cannot be read as evidence to shew the intention of the parties, unless the suit be to rectify the settlement, or the settlement refers to them.

Mistake as to legatee's name or description.

Amb. 175. 374. 2 P. W. 141. Amb. 524. 3 Vez. jun. 148.

Where there is a mistake in the name or description of a legatee, evidence is admissible to prove the person.

Sentence in ecclesiastical court.

Amb. 756.

Sentence in ecclesiastical court *ex directo*, in a matter properly cognizable there, is conclusive evidence, where the same matter comes in question collaterally in a court of law or equity.

No

No proofs to be read in the House of Lords which were not made use of in Chancery. Appeal. Prec. Ch. 212.

For more under this head as to the general question of evidence, see
Gilbert's Law of Evidence.
Fonblanque's Treat. on Eq. tit. *Evidence*, in the Index.

EXAMINERS.

[THEY are two, whose office is to examine upon oath the witnesses on both sides that are brought before them in any cause, as also parties in contempt, and to put their depositions and answers to the interrogatories into writing.] Who.

[They are appointed by the Master of the Rolls; and their office is kept at the Rolls, and commonly executed by deputies.] How appointed.

Their oath is:

[" You shall swear well and truly, according to " your skill and ability, to exercise and occupy the " office of an examiner in the Queen's Court of " Chancery, whereunto you are admitted; and duly, " justly, and equally, you shall examine their causes " that shall be committed unto you, without any fa- " vour or corruption, (and without any fee or re- " ward,) of any person or persons to be had, other- " wise than shall of right appertain concerning the " same: and you shall be attendant as well to further " the Queen's business as the same causes, from " time to time, as need shall require: and you shall " not publish or shew the same depositions to any " person before publication in the Court, without " warrant of the same court."] Oath.

[They (by their deputies commonly) examine upon oath the parties in any suit, and witnesses produced on either side; and put their answers and depositions made to interrogatories into writing, which they are to keep close and private till publication.] Witnses and parties.

[But the witnesses or parties must be sworn before a Master to answer truly to the interrogatories, and their

names

names who are sworn must be inserted in the interrogatories by the Master, and then they may be examined.]

Duty of examiners.

[By order of the Court, which well knows the consequence of good examiners, and how much depends thereon, the examiners (in whom the Court reposeth much confidence) are themselves *in person* to be diligent in examination of witnesses, and not intrust the same to mean and inferior clerks; and are to take care to hold the witnesses to the point interrogated, and not to run into extravagancies and matters not pertinent to the question, thereby wasting paper for their own profit; of which the Court expects a strict account.] [Or. Ch. 106.]

[The examiners are to take care they employ under them none but persons of known integrity and ability, who shall take an oath not to deliver or make known directly or indirectly to the adverse party, or any other, save the deponent who comes to be examined in any of the interrogatories delivered to be examined upon any examination by him taken, or remaining in the Examiners' office, or an extract, copy, or breviate thereof, before publication be thereof passed, and the copies thereof taken. And if any such deputy, clerk, or person, so employed, shall be found faulty in the premises, he shall be expulsed the office, and the examiner who so employed him shall be also answerable to the Court for such misdemeanor, and to the party grieved for his costs and damages sustained thereby; and such solicitor, or other person, who shall be discovered to have had a hand therein, shall be liable to such censure for the offence as the Court shall find just to inflict upon him.] [Or. Ch. 106.]

Examier punished.

29 *April* 1687. An examiner's clerk was suspended for intrusting one, who was no sworn clerk of the office, to transcribe part of the depositions of a witness, before the witness had perfected her examination, or publication was past in the cause. Or. Ch. 172.

EXAMINATION OF WITNESSES.

VIDE

Witness.
Bill to perpetuate.
Parties.
Contempt.
Commission to examine.
Subpœnâ to testify.

[WITNESSES are ordinarily to be examined before hearing.] When.

[In Court,—by an examiner or his deputy.] By whom.

[In the Country,—by commissioners (two at the least) on a *dedimus*.]

[Said, where the plaintiff would examine witnesses, he must apply, and serve the defendant with a *subpœnâ ad rejungendam*, and also give a rule to rejoin. *Said, the rule is not now used.*] [Com. Att. 823.]

[Eight days after appearance to the *subpœnâ*, or eight days after the return, and oath made of the service thereof, the plaintiff may examine: and if the plaintiff's clerk intends to take a *dedimus*, he must demand commissioner's names of the defendant's clerk; which, if he neglects to give him by the end of the same term, the plaintiff might heretofore, without motion or petition, give names; and by the second seal after term take a commission *ex parte*; but it is not now to be had without order.]

Examination in Court.

[AFTER a perfect answer is in, either party, until publication is passed, may examine in court what witnesses he pleases, not examined before; but not before answer, without special order.] Before publication passed. [Px. Al. 19, 20. Or. Ch. 33.]

[After publication, neither party shall examine any witnesses but by special order upon good cause shewn, and an affidavit by the party desiring to examine, that neither he, nor any for him, by his direction or privity, or to his knowledge, hath read, seen, or been informed of, any the depositions already taken After publication.

in the cause; and that till the witnesses, he desires, be examined, (if the Court pleases to order they shall be so;) he will not read, nor willingly see, hear, or be informed of those; nor shall any for him, by his order, privity, or direction, read, see, hear, or be informed of the same.]

[An affidavit was, that he had not seen, &c. nor should nor would *any for him*, &c. *see*, &c. The Court ordered him to amend (if he thought fit) his affidavit, and add, that he also would not see, &c. if he meant to have what he moved for granted.]

[Upon such affidavit after publication, and some good cause shewn either upon oath or certificate of commissioners, why the party could not get his witnesses examined in the ordinary time, leave is frequently granted to examine by a time prefixed, provided the party shall not in the mean time see, &c. any of the former examinations.]

[Toth. 22.]

After hearing.

[As upon special reason the court will order a witness to be examined after publication, so will it after hearing *ad informand. conscientiam judicis.*]

[1 Ch. Ca 228.]

[After hearing, witnesses have been ordered to be re-examined to clear the matter.]

[Where any party shall ground a motion or petition on an affidavit, of his having material witnesses to examine, whereby to gain longer time to examine, such affidavit shall not only contain the names of the chiefest of such witnesses; but the points on which such witnesses are desired to be examined; to the end the Court may see whether such points be material to be examined, and whether before or after hearing.]

Or. Ch. 166.

Insufficient answer.

[Said, If an answer is in, and witnesses examined, and then the answer is reported insufficient, and a further or better is put in; such examination will be suppressed and not allowed of at hearing.]

[Pr. H. Ch. 15.]

Account.

[Matters of account may be examined either before or after hearing.]

Witness produced.

[No witness shall be examined in court without the privity of the adverse party, to whom the party so to be examined shall be shewn, and notice of his name and place of dwelling delivered in writing, by those that shall produce him to the adverse party's clerk in court. And the examiner is to take care, and be well satisfied, that such notice be given; and then shall add to the title of such witnesses examinations the time

Px. Alm. 20.
Or. Ch. 103.

time of ſuch notice given, and the name of the perſons by and to whom it is given, that at the hearing of the cauſe, the ſuitor be not delayed on pretence of want of notice.]

[Said, if a witneſs be examined by commiſſioners in the country. He ſhall not be examined again here in court without ſpecial order.] Witneſs re-examined. [Cl. Tut. 15.]

[Witneſſes being examined in a croſs-cauſe without the other ſide's knowing of it, the Court ordered publication to ſtay till notice ſhould be given the other ſide, where the witneſſes lived, and till they might be examined on his behalf.] Notice to the other ſide. Publication ſtayed.

[After a copy of the rule or order, whereby publication paſſed, is delivered to the examiner; no witneſſes ſwore before publication ſhall be by him examined in the cauſe. So that before ſuch notice to the examiner it ſhould ſeem he may.] [Or. Ch. 103.]

[Where publication was paſſed in one croſs-cauſe between the ſame parties, upon the ſame titles to lands, the Court would not ſuffer the plaintiff in the other cauſe to examine witneſſes.] Publication paſſed, examination refuſed. [Pr.H.Ch.180.]

[The examiner is to examine the defendant to the interrogatories *ſeriatim*, and not to permit him to read over, or hear read, any other interrogatory till that in hand be fully finiſhed, that by this means the truth may not be eluded or concealed, which it might more eaſily be, if a witneſs knew every queſtion that would be aſked him, before he anſwered any.] How witneſſes are examined. [Or. Ch. 105]

[Much leſs is he to ſuffer the defendant to have the interrogatories, and pen his own depoſitions, or depart after he hath heard an interrogatory read to him, till he has perfected his examination thereto.] [Ibidem.]

[If any witneſs ſhall refuſe to conform himſelf, the examiner is thereof to give notice to the clerk on the other ſide; and to proceed no further in his examination without the conſent of the ſaid clerk, or order made in court to warrant his ſo doing.] [Ibidem.]

[The examiner ſhall not examine any witneſs to invalidate the teſtimony of any other witneſs, but by ſpecial order of Court, which is to be ſparingly granted, and upon exceptions filed with the examiner, (without fee,) and notice thereof given to the adverſe party or his clerk, together with a true copy of the exceptions at the charge of the party ſo examining.] [Or. Ch. 105.]

[In examining witneſſes, the examiner ſhall not uſe any idle repetitions, or needleſs circumſtances, nor ſet down any anſwer to the queſtions to which the examinant cannot depoſe, other than *thus, to ſuch interrogatory this deponent cannot depoſe.* If ſuch impertinences be obſerved by the Court, the examiner is to recompence the charge thereof to the party grieved as the Court ſhall award.]

[Or. Ch. 106.]

[No re-examination of a witneſs upon the ſame interrogatory, and that he ſpoke uncertainly on the firſt examination, is to be without leave and order of Court.—*Vide Witneſs.*]

1 Bro. 388.

Nor on any other interrogatory.

[A maſter examined one witneſs three times to a matter of account, and the depoſition was ſuppreſſed.]

2 Cha. Ca. 79.

The examiner is not ſtrictly bound to the letter of the interrogatory, but ought to explain every other matter or thing which ariſeth neceſſarily thereupon, for manifeſtation of the whole truth.

4 Inſt. 278.
9 Rep. 70.

After the witneſs is fully examined, the depoſitions are read over to him, and the witneſs is at liberty to amend or alter any thing, after which he ſigns them, and then (and not before) the examination is complete and good evidence.

Hind. 323.

Where a witneſs dies after examination, but before ſuch examination is ſigned by him, the depoſitions cannot be made uſe of.

1 W. 414.

If after publication one party has an order to examine upon the uſual affidavit, the other party may not only croſs-examine, but examine at large.

1 Vern. 253.

EXAMINATION DE BENE ESSE.

VIDE

Witneſſes, 359.

What.

[AFTER a bill filed, and before anſwer, the Court, on affidavit, that any of the complainant's witneſſes are aged and infirm, ſick, or going beyond ſea, whereby the plaintiff thinks he is in danger of loſing their

their testimony, will order them to be examined *de bene esse*, i. e. so as to be valid if the plaintiff has not an opportunity to examine them after answer; as if in one case they die before answer, and in the other return not after. In either of which cases the depositions may be made use of either in this court or at law.] [Pr. Alm. 22.] 1 Vern. 331.

[But if the witnesses are alive, &c. after answer, they must be re-examined, if the plaintiff expect any benefit by them.] Re-examination after answer.

[And though all the bill be not answered, yet they must be examined in chief, seeing the defendant's traverse puts all in issue, so that the plaintiff may examine to those points not fully answered.]

Plaintiff shall not have leave to examine witnesses *de bene esse*, because they are going abroad, if they are his servants and he might keep them at home. Where examination refused. In Scacc. Bunb. 320.

A witness ordered to be examined *de bene esse*, where the thing examined to lay only in his knowledge, and was a matter of great importance; though the witness was not proved old or infirm. Where granted. 3 P. Wil. 77. 2 Bro. 641. 4 Bro. 157.

A witness aged seventy years, will be ordered of course to be examined *de bene esse*, upon motion or petition, grounded on an affidavit of the age. Hind. 368.

The reason why the Court allows the taking of depositions *de bene* is, either from contempt of the party in not answering, and thereby preventing the joining of issue, or else where the party is in danger of losing his witnesses; but if the witnesses live, and are examined in chief, the depositions *de bene esse* are useless. And why. 1 P. W. 568.

The Court refused to publish *depositions* taken *de bene esse*, in order to compare them with depositions in the same cause, taken on examination in chief. Publication. 1 P. W. 567.

Depositions *de bene esse* are only published where no examination in chief can be; in this case a commission had issued to a foreign country, and could not be executed by reason of the interference of the sovereign. 2 Ves. 326. 336. S. C. Amb. 108. S. C.

Depositions *de bene esse*, where witnesses are dead, and no opportunity to examine in chief, though after great length of time, the examination being taken in 1710, and the present motion in 1754, published, but without prejudice to exception at the hearing. Publication. 2 Ves. 497.

A witness was examined *de bene esse*, before appearance. Defendant appeared and answered, the witness survived 18 months, the depositions had been published Publication. 1 Bro. 24.

lished in pursuance of an order, upon consent. The plaintiff after hearing insisted upon reading the depositions, but the Chancellor was of opinion that they could not be read.

Notice. 4 Bro. 540.

Depositions of witnesses *de bene esse* taken before appearance *ex parte*, and without notice suppressed.

Perjury. 1 P. W. 569.

Said, a prosecution for perjury would not lie upon depositions taken *de bene esse*, there being no issue joined, as there must be before depositions are taken in chief.

EXAMINATION OF PARTIES.

VIDE

Interrogatories.
Contempt.
Proofs.
Witnesses.

Account.

[A PARTY may be examined to an account, or to a particular thing, after hearing.]

[Said, if after a cause is at issue the plaintiff desires the defendant may be sworn and examined upon interrogatories as a witness, he must ordinarily stand to the defendant's depositions as conclusive, else the Court will not compel the defendant to be examined.] [2 Px. Alm. 79.]

[But if some new act be done by the defendant after issue joined, as making a feoffment or a lease by covin, or such like, he may compel the defendant to be examined without being concluded.] [Ibid.]

[Where it was moved that the defendant, who had not sworn fully by his answer, might be examined upon interrogatories upon an account decreed, (the plaintiff for saving charge not having excepted to his answer,) the Court inclined to grant it, but there wanted notice.]

[Though witnesses be examined, yet you may afterwards examine the defendant.]

[But said, it is a rule, if the defendant be first examined, you shall not afterwards examine witnesses, thereby to convict or prove him guilty of perjury.] [Cl. Tut. 7.]

[After

[After a decree inrolled, in which was no order to examine the defendant upon interrogatories, the Court would not order him to be examined to the discovery of deeds.] [2 Ch. Rep. 10.]

Defendant being a weak man, and to be examined upon interrogatories, the Master was ordered to take his examination, lest he should unwarily admit something against himself, which was not true. Defendant. 3 P. W. 290.

The deposition of one defendant may be read for another, and also for the plaintiff, but if the defendant, whose evidence is offered to be read for another defendant be by possibility liable to costs, his evidence should be refused. Defendant. 3 Atk. 401. 402.

Said, that a plaintiff cannot examine a co-plaintiff; but if his evidence be necessary, he must be made a defendant. Co-plaintiff.

EXCEPTIONS.

VIDE

Answer.
Report.

[BY exceptions are commonly understood the allegations of a party in writing, pretending, that some pleading or proceeding in a cause is insufficient, mistaken, or irregular; in certain points particularly expressed.] What.

[Such are exceptions to an answer, to a Master's report.]

[Less common are exceptions to a witness.]

[Exceptions to an answer are on motion referred to a Master to examine, and thereon report his opinion to the Court, whose certificate is conclusive, unless either party take exceptions to it, which he may do; and it is often done to the delay and expence of suitors.] Reference to a Master.

[The party excepting to a report must deposit five pounds with the Register, which, if the exceptions be over-ruled, must be paid to the other party; if not, then to him, who deposited the money.] Deposit. [Or. Ch. 120. 142. 168.]

[Save, that if either party except to a Master's report touching the sufficiency of an answer, or other matter, he shall pay twenty shillings for every exception, or distinct branch of an exception, which shall on arguing be over-ruled, or declared frivolous and impertinent; and for such as shall be waived and not opened, ten shillings: and these sums shall be paid over and above the five pounds deposited, if the report be affirmed; or out of the five pounds, though the report be altered.]

[Or. Ch. 120. 142. 168.]

Costs.

[Yet where the exceptions, or any of them, are found true, the other party ordinarily pays five pounds costs: but it is in the discretion of the Court to order more, or that each bear their own costs.]

The Court by fixing a gross sum has virtually annulled the former orders, and the costs attending exceptions to the Master's report are now limited to the sum of five pounds; the Court however sometimes exercises a discretion according to the exigency of the case, and gives costs or not as it sees occasion.

Hind. 298.

Better answer.

[And if they be found against a defendant upon answer, he must pay, and put in a better answer.]

Report reviewed.

[If they be upon another matter, the Court determines as it sees cause upon hearing them, or sends the party back to the Master to review his report.]

Filed with register.

[Exceptions to reports touching the sufficiency or insufficiency of answers are not to be filed with the register, unless notice be given to the clerk on the other side.]

Or. Ch. 197.

[Said, it is now the practice, and thought sufficient, not to file them with the Register, but deliver them to the clerk on the other side.]

If the Master reports the answer insufficient in one single exception, the defendant must except to the report, or submit to answer; if he submits to answer, he must answer fully, for by submitting he has allowed the judgment of the Master to be good. And he shall not insist in his second answer, that he ought not to answer the exceptions, nor shall he afterwards except to the report, and so bring the question before the Court.

1 Harr. 316. 318.

But if the defendant has insisted upon any matter as a reason for not answering, though he does not except to the Master's report, yet he is not precluded from

from insisting on the same matter in a second answer, and taking the opinion of the Court, by exceptions to the Master's report whether he ought to answer that point or not. 2 Ves. 491. 1 Harr. 316.

On an answer's being reported not scandalous or impertinent, if the plaintiff except to the report, he must shew specially wherein it is scandalous or impertinent. Report. Impertinence. 2 P. W. 182.

Exceptions were taken to an answer, which was reported sufficient. Plaintiff amends his bill, and upon coming in of the second answer, takes seventy exceptions; and upon motion these exceptions were referred to the same Master, as the former set had been referred to. Second exceptions referred to the same master. 1 Bro. 39.

Exceptions are not admitted to the Master's report for costs only; the regular method is to state the articles objected to in a petition, and pray leave to except. Costs. 3 Bro. 321.

On exceptions to the Master's report, where the exceptant prevails in any of the exceptions, he is entitled to the deposit. Deposit. 4 Bro. 1.

Exceptions to an Answer.

[IF an answer be insufficient in one or more points, the complainants may except thereto, and enforce the defendant to a better answer.—Vide *Subpœnâ.*] What.

[The exceptions must shew some particular points wherein the answer is defective, and not surmise the insufficiency in general only, else the Court will not refer it to be examined.] How drawn. [Toth. 49.]

[If the answer be good to a common intent, the plaintiff must reply, and prove the matter of his bill to be true, if he can, and not insist upon the insufficiency of the answer.] Replication. [Com. Att. 423.]

[——— This seems to be intended as to things publicly done, and not resting in the defendant's knowledge only; for the defendant ought to answer secret transactions with certainty.] Answer sufficient. [Pr. H. Ch. 107.]

Exceptions are drawn, or perused and signed by counsel: no new exception can afterwards be added. Filing exceptions.

—The practice in filing exceptions to an answer, is to deliver them so signed and upon unstamped paper, Harr. 311.]

to

to the defendant's clerk in court, or his clerk, at his seat, marking them with the date of the delivery.

Replication.

[No exceptions may ordinarily be taken to an answer after replication put in; for by the replication it is admitted sufficient: yet in some cases the Court has ordered the replication to be taken off the file, and suffered exceptions to be put in.]

[Com. Sol. 25.]
[Px. Alm. 9.]

When taken.

[If the answer be filed in term, the plaintiff must the same term, or eight days after term, deliver exceptions in writing to the counsel whose hand is to the answer, or the defendant's clerk in court.]

[Ibidem.
Or. Ch. 101.]

[If filed in the vacation, the plaintiff hath so long as till eight days passed in the beginning of the next term to put in exceptions.]

[Ibidem.]

[They cannot be put in afterwards without motion or consent of the other side to receive them.]

If an answer come in in *Michaelmas* term, and the plaintiff does not take exceptions within eight days of *Hilary* term, upon applying to the Court, he is of course entitled to take exceptions, provided he does it within two terms, the term in which he moves inclusive; but if he neglect to do it then, the Court will not give leave, but upon particular circumstances.

3 Atk. 19.
Barnard. 53.

[If the defendant do within eight days after such delivery satisfy the plaintiff of the invalidity of his exceptions, or do amend his answer in the same time, or agree with the plaintiff, or his counsel, or solicitor, to amend it accordingly, and pays twenty shillings costs, the plaintiff shall go on to reply.]

[Or. Ch. 101.]

[But if the defendant fail to do the same, or puts in a second or other insufficient answer, the plaintiff may on motion get the first, or any such further insufficient answer referred to a Master; and if the same be ruled insufficient, the defendant shall pay costs, and make a further and better answer; but if it be reported good, the plaintiff shall pay the defendant forty shillings costs, and the answer shall stand.]

[Ibidem.]

First answer.
Costs.
Hind. 264.

[If the first answer be ruled insufficient, the defendant shall pay forty shillings, if it was put in in person: if by commission, fifty shillings.]

Second answer.
Costs.

[If the second answer be reported insufficient in any of the points formerly certified, the defendant shall pay three pounds.]

Third.

[And upon the third insufficient answer, four pounds.]

[And

[And upon a foruth, five pounds, and be examined upon interrogatories to the points reported insufficient; and shall be committed till he has perfectly answered those interrogatories, and paid the costs.] Fourth.

[A defendant's plea was over-ruled, and then he put in three insufficient answers, the Court did not think fit to commit him to be examined on interrogatories, as if he had put in four insufficient answers.] [1 Ch. Ca. 279.]

[If an answer is reported insufficient, the complainant may at his election have one *subpœnâ* for costs, and another to make a better answer, or one *subpœnâ* for both.] Costs. [1 Pr. Alm. Toth.]

[No new commission shall be awarded for taking a second answer, till the costs of the first insufficient answer be paid; nor then, but by order on affidavit of the party's inability to travel, or other good matter to satisfy the Court touching the delay, or by assent of the plaintiff or his clerk.] [Or. Ch. 102.]

[He that excepts to an answer, is tied to no certain time to get it referred, unless by special order for that purpose obtained, or with respect to his injunction, lest it be dissolved for his affected delay.] When referred.

[The plaintiff cannot refer exceptions to a first answer till eight days after they are filed: but upon a second insufficient answer, they may be referred immediately.]

[After the answer was reported insufficient, and the defendant had appeared upon a new *subpœnâ* before any attachment against him was sealed, yet the Court would not suffer him to except to the report, although he had paid down the sum appointed to be deposited upon executing a Master's report.]

[If an answer be reported scandalous or impertinent, the Court may be moved, that that part of it may be expunged, and that the defendant pay costs; which will be ordered.]

Where the defendant answers to part, and pleads to all other matters not answered unto, the plaintiff cannot put in exceptions to the answer till he has first argued the plea, or obtained an order that the plea shall stand for an answer with liberty to except. Plea. 1 Vern. 344. 2 Atk. 390.

Defendant pleads to the whole bill, and on arguing the plea, it was ordered to stand for an answer, and the Court in saying it should stand for an answer, must 3 P. W. 239.

have

have meant a sufficient answer, an insufficient answer being as none.

3 P. W. 327. in notis.

Defendant answers as to the discovery, and pleads as to the relief, the plaintiff may except to any matter of discovery, before the plea argued.

Demurrer.
3 P. W. 326.

Demurrer to part, and insufficient answer to other part of the bill, plaintiff cannot except till the demurrer be argued.

Plea.
Demurrer.
Bunb. 123.

If a plea or demurrer be over-ruled, the defendant must answer the whole bill, and the ordinary process of contempt issues to compel an answer, as in other cases. But if an answer was filed with the plea or demurrer, the defendant, upon his plea or demurrer being over-ruled, need not put in another answer till the plaintiff has taken exceptions.

Plea.
Demurrer.
Answer.
3 Bro. 39.

Where a bill charges defendant with a crime, and makes him liable to a penalty, if the crime or penalty be created by the statute-law, the defendant need not plead or demur to it; but upon exceptions to his answer, he may insist that he is not liable.

Ibidem.

But if the time for suing for the penalty be expired, when the second answer is put in, upon exceptions to that he will be compelled to answer.

Second answer.
1 Ves. jun. 88.

A second answer may be filed pending exceptions to the first, provided it be filed before an order to amend the bill, and that exceptions and amendments may be answered together.

Witness.
2 Bro. 252.

It is no answer on exceptions, that the defendant is a mere witness, and ought not to have been made a party; for having submitted to answer, he must answer fully.—See title *Answer*.

Infant.
4 Bro. 256.

Exceptions will not lie to the answer of an infant.

Certificate.
2 Vern. 79.

When the Court refers the matter in dispute to gentlemen in the country, exceptions will not lie to their certificate.

Joint and several answer.
Ayliffe, 46.

Three defendants put in a joint and several answer, which is reported insufficient; two of them receive exceptions, the other insists upon having them argued: allowed.

Deeds.
3 Harr. 322.

If the bill prays that defendant may set out deeds *in hæc verba*, exceptions will lie, if he does not.

WRIT OF EXECUTION

(*Vide Writ of Assistance*)

[IS a process of this Court, reciting an order or decree of the Court, (be it final or interlocutory,) or the substance thereof, or of some part thereof, and requiring obedience to so much of the ordering part as is recited, and concerns the party to perform.] What. [Pr. H. Ch. 24.]

[Said, after the decree is past, *i. e.* drawn up and signed by my Lord Chancellor, and inrolled, the party may have a writ *de executione judicii.*]

[But he cannot have it upon the decretal order only drawn up, except in regard of his poverty, or some other cause, the Court thinks fit so to order on petition or motion.] Not upon a decretal order. West. Pr. Sect. 45.

[When the execution is upon the decree for payment of money, it must be personally served by delivering the party the process under seal, or (which is more usual) shewing it him, and delivering him a copy of it: and if a party to the decree himself serves it not, who might by the immediate authority of the decree demand and receive the money, the party that does serve it must have, and shew the party on whom he serves it, a letter of attorney from the other party to receive the money, and must demand it, else the not paying it to a servant will be no contempt.] Decree for payment of money. [Pr. H. Ch. 24. Cl. Tut. 3.]

[If the decree is not for money, then it may be served by leaving the writ under seal at the party's house, or their abode, if he be not met with himself.] If not for money how served. [Pr. H. Ch. 24.]

[If upon such service, as aforesaid, the party obey not the decree, then upon affidavit of the service, and that he hath not performed the decree, the ordinary process of contempt, attachment, proclamation, and commission of rebellion may of course be made out against him, as upon a *subpœnâ ad comparend.* &c. and so on to a Serjeant at Arms.] Service. [Pr. H. Ch. 25. Com. Att. 438.]

[Affidavit of another's making some of the defendants privy to a writ of execution, and that he left the writ with one *J. S.* from whom a defendant confesses he had the writ, held a good proof of service; but the

[Ca. Rep. 75.] usual course is to give the first served, copies, shewing them the writ under seal.]

Disobedience to decree. Contempt.

[If a party in contempt for not obeying a decree be taken by a Serjeant at Arms, he is to be committed to the Fleet, there to remain till he perform the decree, so far as is to be presently done, and give good security by recognizance with sureties for the performance of what is to be done afterwards, if any thing remain to be performed, and do also pay the other party his costs in prosecuting the contempt.]

[Pr. H. Ch. 24. Com. Att. 438.]

Contempt.

[So if he continue any considerable time in custody without doing any thing, the Court will set him a day to perform the decree, which he upon notice still refusing to do, the plaintiff may cause him to be brought into court, (by an *habeas corpus*, had upon motion,) and upon his still refusing, the Court will take such further course as shall seem fit; and has for such contempt sometimes set a fine upon him, and awarded process out of the Petty-Bag to the Sheriff, where he hath an estate to levy, and pay it into the Hamper. (Said in the latter end of the Lord *Elesmere*'s time, the fines being estreated into the Exchequer, were much disputed there.)]

[Pr. H. Ch. 25.] Cur. Can. 368.

[If he still continue in prison wilful and obstinate, the Court has some time ordered him to be kept close prisoner, till he should perform the decree; for imprisonment for breach of a decree, is in nature of an execution. *Vide* 4 *Bro.* 89.]

[Ibid. 25.]

[Ibidem.]

[In *Webb* and *Braithwaite*'s case, *M.* 4 *Jac.* 1. his wife and children were restrained coming to him.]

Ch. Ca. 1.

[But if what *Tothill* tells us be true, it seems yet harder, that irons were ordered to be laid upon a man in the Feet, because he would not perform a decree.]

Sequestration.

[In case of such contempt and obstinacy, where money is decreed, a sequestration will be granted either of money, goods, (even of things in action,) or of the profits of his lands, freehold and copyhold; and that as well where a decree is for the payment of a personal duty, as money upon a contract, debt, account, *&c.* as where it is for rent-charges, *&c.* issuing out of the land.]

[Toth. 175, 6. Com. Att. 439. Pr. H. Ch. 25.]

Contempt. Writ of assistance.

[And in case of such decree, if the defendant is not taken, but stands all process of contempt upon the decree, and the Serjeant at Arms certifies that he is not to be found, or being taken by him is rescued, a sequestration

tration will be granted, and what further process is necessary as a writ of assistance.]

[In case of a decree for the possession of lands, there seems to have been several usages touching the process.]

[By a rule in my Lord *Bacon*'s time, first a writ of execution was to go forth; and if that were disobeyed, then process of contempt according to the course of the Court unto a commission of rebellion; then a Serjeant at Arms; and if a Serjeant at Arms could not find the party, or if the Serjeant was resisted, or that the party upon his commitment persisted in his disobedience, an injunction was to be granted for the possession: and in case that were disobeyed, then a commission to the Sheriff, or to Justices of the Peace to put the other party in possession.]

Contempt. Lord Bacon's rule.

[Toth. 44.] Cur. Can. 369.

[Others tell us, in the writ of execution used to be contained an injunction to him against whom the decree passed, either to yield possession to the other party, or not to disturb him, if he were in possession, (as the case was,) which last is called a *perpetual Injunction*. But of later times its omitted in the writ of execution; and if the party with whom the decree passes have the possession, and a perpetual injunction is decreed him to quit his possession, he takes it distinct, and serves it along with the execution of the decree, if he pleases. But it should seem the ancient course is the most regular, and so it hath been held.]

Injunction.

[1 Ch. Rep. 178—187.]

[Some say, if the party against whom the decree is, has the possession; then the decree, with the writ of execution being served, and an attachment made for the contempt of not obeying, the Court, on producing the attachment (or further process of contempt) *sub pede sigilli*, will grant an injunction to him that has the possession (and to his tenants) to put the party, with whom the decree is, in possession; and if the injunction be disobeyed, a writ of assistance to the Sheriff, to put and keep the party in possession.]

Injunction. Writ of assistance.

[Com. Att. 438. West. P. sect. 46. 1 Px. Alm. 44. Prac. H. Ch. 24.]

[Where the defendant was not to be found, and it was thereupon ordered, that service of a decretal order and writ of execution on the clerk in court should be good; held *per Cur.* that the shewing them, and leaving a copy thereof with the clerk's agent, at his seat in the office, was sufficient: nor needs there (in such case) a letter of attorney to receive money decreed, to bring the defendant into contempt: for the clerk

3 Atk. 276. Service of writ of execution where defendant not to be found.

is

is not to pay the money, but to give his client notice to do it.]

Service.

[Though ordinarily where the decree is for the payment of money to the party, he must be sought out and personally served, &c. otherwise the non-payment will not induce a contempt; yet in some case, if the writ be left with a servant, and it appear to have afterwards come to the party's hands, this will be sufficent.]

[Cl. Tut. 20.]

2 P. W. 420. Subpœna ad fac. attornat.

Decree for sale of estate to pay debts, if the party's clerk in court be dead, a *subpœnâ ad faciend. attornat.* must be taken out and served, before any process can go against the party refusing to execute the decree.

Proof of service.

[Said, if a party upon his examination touching his contempt of a decree, denies service and contempt, it must be directly proved by two witnesses.]

[Cl. Tut. 6.]

How decrees entered by Six Clerks.

[That decrees and dismissions may be easily found, the Six Clerks are to keep a public book for entering all made and signed since the 29th *Maii* 1699; and to that end the Register, at the end of every term, shall deliver to one of the Six Clerks a list of all signed the term and vacation before.]

[Or. Ch. 117.]

Where decree is not acted upon for a year.

[Said, if a cause has remained above a year without proceedings, *post decree*, the decree not perfected; the plaintiff must serve the defendant with a *subpœnâ* to make an attorney before he can proceed further.—*Vide Subpœnâ.*]

Decree not acted upon.

Where one that claimed under a decree did not in time apply to this Court for an injunction, but suffered a trial at law, &c. whereupon he was ousted of his possession: he could not after be helped upon the decree, by the ordinary process and forms, but was put to a new bill.

2 Ch. Rep. 126.

Decree to produce deeds and writings.

If by the decree the defendant is to produce deeds and writings, or to attend and be examined upon interrogatories, the ancient rule used to be, to serve him with a copy of a writ of execution of the decree, and shew it him under seal, and at the same time to serve him with a warrant from the Master, to give him reasonable time to produce them, and no writ of execution was allowed till after the decree was signed and inrolled.

Gilb. Chan. 165.

The method now seems to be to take out documents from the Master, which are served on the adverse party's clerk; and on his not producing the deeds, and the

the Master's certifying the default, a motion is made to produce them in four days or stand committed; and this order is served on the party's clerk in court. And if the writ of execution of the decree and the Master's summons have been served upon the party personally, he is inexcusable and ought to be committed. But it certainly ought to be asked whether he has been served or not before the motion is granted; this however is never done. Gilb. Chan. 165.

EXECUTORS.

VIDE

Costs.

[EXECUTOR temporary proves the will, afterwards his executorship determines. Held, the subsequent executor may sue here without further probate of the will.] [1 Ch. Ca. 165.]

[If a bill is brought by an administrator *durante minore ætate* of an infant; and pending the suit, the infant comes of the age of seventeen years, this abates not the bill.—Said, they may in such case either go on without altering the bill, or may, by leave of the Court, amend it.] [Cary. Rep. 31.]

[If a suit be here against two executors, and one of them appeareth, he shall not ordinarily be compelled to answer, till the other be driven to answer also; for they are but one person.] [Cary. Rep. 30.]

[Two executors are plaintiffs, one of them is excommunicate; the other may be severed; and the defendant shall answer him.] [Toth. 74.]

[One executor may sue another co-executor: for the matter is merely testamentary.] [Toth. 74. Pr. H. Ch. 128.]

An executor, from his name, is but a *trustee*, he being to execute his testator's will; and therefore called an executor: and this is the *only* reason why a legatee may bring a bill against an executor for his legacy. P.W. 549. 575.

If executors sever in their receipts and disbursements, in such case they shall only be answerable *pro tanto*; Harr. Ch. P. 166.

Darwell v. Burrows, Mich. 8 Ann.

but if they act jointly, each of them shall answer the whole, if one becomes insolvent.

Barnard. Rep. 320.

A person may file a bill as administrator, before administration taken out.

Costs. 1 Vez. jun. 294.

Costs of course against executors, who are decreed to pay interest on account of a breach of trust.

EXEMPLIFICATION.

Proofs.

[SAID, *proofs* cannot be exemplified without bill and answer. Hence, if a bill be dismissed for irregularity or impropriety; as that it is by way of revivor, when it should be an original bill, so that there never was any such cause in court, the depositions cannot be exemplified; seeing the bill cannot.] [1 Ch. Ca. 175.]

[*Contra*, if the bill was dismissed only because the matter of it was not proper for equity to decree.] [Ibid.]

Deed.

[An exemplification of a deed has been ordered to be pleaded at law, where the deed inrolled could not be brought in.] [Toth. 89, 90.]

How passed.

[The Masters are not to pass any exemplifications of depositions on a bare sight of the copies only, without first calling the officer or officers, who have the custody of the records, or the originals of such copies, or some sworn clerk of his or their office, who is to produce the same before them to warrant the signing thereof.] Ord. Chan. 119. Cur. Canc. 299.

What.

An exemplification is the copy or example of a matter recorded or inrolled; as decrees, letters patents, depositions, *&c.* and is made out or copied from the inrolment thereof, and sealed with the Great Seal. Cur. Canc. 375.

Effect of exemplification.

And such *exemplifications* are as effectual to be pleaded, or produced in evidence, as the decree, or letters patents, or depositions themselves are. Ibid.

3 Inst. 173.

Nothing but matter of record ought to be exemplified.

Inrolled.

All decrees, deeds, *&c.* must be first inrolled before they are exemplified. Cur. Canc. 375.

Patent.

Exemplification of part of a patent not suffered to be read in evidence, notwithstanding the statutes of 3 and 4 of *Edw.* 6th, and 13 *Eliz.* where the other side have no time to consult the patent-roll, and so may be surprised with an imperfect exemplification. Prec. Ch. 59.

FEES.

[IN 1638, there was an order by the King, that the Judges of all the courts at *Westminster*, as had occasion to impannel juries of the officers and clerks of the same courts, to inquire of matters touching the same courts, should impannel juries that term, to inquire what fees had been usually taken by the several officers of the same courts, for thirty years then last past: upon certificate of which, his Majesty would take such course as should seem meet. And the Lord Keeper was not only to do this in the Court of Chancery, but to signify this his Majesty's pleasure to the Judges of the other courts, that they might do the same.]

[*This was the oath of those that were to inquire of the fees in Chancery.*]

[" You shall diligently inquire, and true presentment make of all such fees and payments as now are, and by the space of thirty years last past, have been used to be taken by any officer, minister, or clerk of this court, as belonging, or claimed to belong to him or them, by reason of his office, place, or clerkship; and what fees now taken or claimed, have begun, inhanced, increased, or innovated, within the space of thirty years, and when, and how long since, and how the same were so begun, innovated, inhanced, or increased."] Oath.

FORM.

[REGULARLY, a man shall not be prejudiced in courts of equity, for mispleading or want of form: and so he can prove his bill *viis et modis*, it is sufficient: for the Judges of the courts sit there, *secundum potestatem absolutam*, and judge *secundum conscientiam et non secundum allegata*. However, for the avoiding confusion and unnecessary charge, some small regard to form seems convenient, as may be observed in the titles, *Bill*, *Answer*, *Plea*, *Demurrer*, &c.]

GUARDIAN.

VIDE

Prochein amy.
Infant.

How he may sue.
[Toth. 10. 108, —9.]

[IT should seem that an infant may sue here, either by himself, by *prochein amy*, or by guardian, as the Court pleases.]

[By whom defend.]

[And so it should seem he may defend, and if of discretion shall answer upon oath.]

But the course is not to call the guardian by that name, but by the name of next friend, yet if he be called by the name of guardian, it is no cause of demurrer.

Cur. Canc. 464.

[An infant of twelve years was ordered to answer not upon oath.]

[Toth. 11.]

Guardian sworn.

[If an infant answers by guardian, the guardian must be sworn; and if it does not appear by the caption, that he was, the answer will be quashed.]

Stat. 12 Car. 2. cap. 24.
Guardian in socage.
1 P. W. 703.

Guardians appointed by will according to the stat. 12 *Car.* 2. *cap.* 24. have no more power than guardians in socage, and are but trustees, on whose misbehaviour, or giving suspicion of misbehaviour, the Court of Chancery will interpose.

Guardianship to two, survivor.
2 P. W. 103.

A guardianship devised to three, without saying and to the survivor of them, yet the survivor shall have it.

Guardian removeable.
2 Ch. Ca. 238.
Cur. Can. 467.
2 P. W. 112.
1 Ves. 160.

Guardian by common law is removeable, not so where appointed by statute; yet the Court will compel him to give security not to marry the infant during minority, without acquainting the Court.

Guardian appointed without suit.
2 P. W. 119.

The right which the King has, as *pater patriæ*, to take care of his subjects in cases of charities, idiots, lunaticks, and infants, falls under the direction of the Court of Chancery, which hath used upon petition only, without any bill or decree, to make order touching such rights.

Without suit.
2 Atk. 14.
3 Atk. 813.

There may be an application to the Court in case of a guardianship of children, though there be no cause depending.

Maintenance.
2 Atk. 315.
Amb. 146.
3 Bro. 88 500.

Maintenance allowed for an infant though no cause in court. But the Court was of opinion that a receiver could not be ordered without suit.

But

But where there is a teſtamentary guardian, the Court will not give maintenance without ſuit, nor decide upon the right of guardianſhip. 2 Atk. 315. Prec. Ch. 106. 3 P. W.

The maxim, that the next of kin to whom the land cannot deſcend is to be guardian in ſocage, not reaſonable. Guardian in ſocage. 2 P. W. 262.

Where an infant is defendant, the ſervice of the ſubpœna to hear judgment muſt be upon the guardian, and not upon the infant. Service. Subpœna. 2 P. W. 643.

The allowance to be made in reſpect of maintenance, muſt have regard to the income of the infant at the time when he was maintained, and not at the time of the application to the Court. Allowance. 3 P. W. 369.

The Court has been very liberal in the allowance made for the maintenance of infants, where the father or the guardian has been in diſtreſs. Allowance. 1 Vez. 160.

If no teſtamentary guardian or mother, the infant having ſocage land, and being of the age of twelve, if female; of fourteen, if male, may chooſe a guardian, and in ſome caſes, the wiſh of the infant, as to reſidence, has been attended to by the Court. Choice. 2 Vez. 375.

Petition that a guardian may be aſſigned, (unleſs to carry on a ſuit, or protect an intereſt,) muſt be purſuant to the ſtatute. 1 Bro. 556.

Where a father, by his will, names guardians for his natural child, the Court will appoint them guardians without reference to the Maſter. 2 Bro. 583.

A guardian may, without the direction of the Court, pay the intereſt of any real incumbrance, and the principal of a mortgage, but he is not compellable to apply the profits of the eſtate of the infant heir to pay off bond debts, nor can he with the rents and profits purchaſe lands, ſo as to prevent the money going in a courſe of adminiſtration. What acts guardians may do. Prec. Ch. 137. 2 Vern 606. 1 Vern. 403. 435. 2 Vern. 480.

One of the guardians of an infant girl takes her from ſchool, and marries her to his own ſon, who has no eſtate, the Court ordered the infant to be produced in court, and committed her to the other guardian, and directed an information to be brought againſt the guardian who married the ward to her diſparagement, but this was held to be no contempt, the ward not being under the immediate care of the Court. Ward. Marriage. 2 P. W. 561.

The guardianſhip of daughters determines by marriage, otherwiſe of ſons. 1 Vez. 91. Marriage.

Appointment by the Chancellor. 3 Bl. Com. 427.

When an orphan has no guardian, the Lord Chancellor has a right to appoint one, and from all proceedings relating thereto, an appeal lies to the House of Lords.

Ward of Court. Amb. 303.

The mere filing a bill is sufficient to make an infant a ward of Court.

Notice. 3 P. W. 117.

Acts of the Court, as the commitment of a wardship, and in a cause depending, are to be taken notice of by every one at his peril, in the same manner as of a *lis pendens*.

Marriage. Contempt. Gilb. 176.

When a child is put under the protection of the Court by a testamentary guardian, it would be a contempt, even of the mother, to marry him without the consent of the guardian.

Marriage. Ca. tem. Tal. 57.

The Court will assist the testamentary guardian in preventing an improper marriage of the infant heir.

Marriage. 3 Atk. 304.

The mother petitioned, that Mr. *B*. might be restrained from marrying her daughter, being a ward of the Court.—Ordered, as he was an infant, that his guardian should not permit him to marry the young lady without the leave of the Court.

Negligence of guardian. 2 Chan. Rep. 97.

If a guardian takes a bond for arrears of rent, he thereby makes it his own debt, and shall be charged with it; but he shall, in his account, be allowed all reasonable expences, and if he be robbed of the rents and profits of the land, without his default or negligence, he shall not be charged therewith.

Stat. 12 Ch. 2. c. 24. 3 Atk. 813.

If a guardian, under the statute 12 *Ch*. 2. *c*. 24, dies, or refuses to take upon himself the guardianship, the Chancellor may appoint a guardian; and such guardian may consent to the marriage of an infant.

Stat. 26 Geo. 2. c. 38.

By the 26th *Geo*. 2. it is enacted, that if any guardians or mothers of persons under age, shall be *non compos mentis*, or in parts beyond the seas, or shall refuse their consent to a proper marriage of such minors, such persons desirous of marrying may apply by petition to the Chancellor, who is empowered to proceed upon such petition in a summary way, and in case the marriage proposed shall, upon examination, appear to be proper, the Chancellor shall judicially declare the same to be so by an order of Court, and such order shall be deemed and taken to be as good and effectual, as if the guardians, or mothers of the parties so petitioning, had consented to such marriage.

Vide 2 *Fonblanq. Treat. Eq*. 244. 252.
Vide *Infant*.

HABEAS CORPUS

[IS a writ directed to the keeper of the Fleet, or some other, to bring into court the body of some person in his custody.] What.

['Tis commonly in order to a party's answering and clearing his contempt, so as he may be discharged or fined, or such order may be made touching the matter, as the Court shall see cause.]

And is had on petition or motion. Cur. Can. 157.

[Sometimes 'tis where a person apprehends himself wrongfully imprisoned by any one, and he brings it in order to his enlargement: and this is a *habeas corpus cum causâ.*] In what cases.

[It is served by delivering this writ to the keeper or other person in whose custody the party is, and keeping a copy thereof.] Service.

[If he obey it not, then issues an *alias*, and so a *pluries*, which if he yields not obedience to, nor makes some return excusing his non-obedience, and which the Court shall think sufficient; then if he be an officer or minister of this court, and it be touching a cause depending here, the Court will punish his contempt: if it be for a matter at large, the party has good remedy by the 30 *Car.* 2. *cap.* 2. if the keeper of the prison do not yield obedience to the writ in the manner there required.] Where the writ is not obeyed.

[A prisoner in a gaol in the country, being in contempt for not performing a decree, may be brought up by this writ, and turned over to the Fleet, whence he is not to go till he has obeyed the decree of this Court.] Prisoner. [2 Ch. Rep. 151. 192.]

Where a defendant, who has appeared, is in prison, and will not answer, an attachment being entered against him, a *habeas corpus* may be moved for to bring him to the bar, to shew cause why he does not answer. Cur. Can. 114.

When a prisoner cometh in, or appears upon a *habeas corpus*, if he be in execution, he shall be remanded to the prison from whence he came; but if upon execution, he is brought up by a *habeas corpus cum causis*, then he shall be sent to the Fleet, and there remain charged with such execution, and such other matters as he was before charged with, in the other prison from whence he came, until he be discharged thereof, and perform the order or decree of this Court. And, Ibid. 2 Hart. 245.

If he lies there in contempt for not performing the decree, the Court, upon motion, will order a sequestration against his personal, and the rents and profits of his real estate, till he has performed the decree, and cleared his contempts, and till further order.

2 Harr. 214.

HEARING.

VIDE

Re-hearing.
Evidence.

Bill and answer.

[IF upon a bill and answer only, there be sufficient ground for a decree, the plaintiff is to proceed to hearing without examining witnesses.]

[Or. Ch. 100.]

[If in such case, the Court shall not find ground for a decree, the bill shall be dismissed with costs, or the plaintiff shall be admitted to reply, &c. if he desire it, on paying down ten pounds within four days after such hearing; else the dismission to stand; and the order in such case to be drawn accordingly.]

[Px. Alm. 14.]

[If this is not prayed, or the money not paid, the decree stands absolute, and is a good bar to a new bill.]

[Ibid.]

Publication.

[No cause must be presented for hearing, the same term publication doth pass, unless by consent of parties.]

[Px. Alm. 25.]

[And the Court will hardly (if at all) order a cause to be heard the same term, publication passeth; because 'tis against the standing course of the Court.]

[A term being expired after publication, the plaintiff may of course have the cause set down for hearing before the Lord Chancellor or the Master of the Rolls.]

[Ibid.]
Com. Att. 436.]

[The ordinary way to obtain this, is by order upon petition; but it may be had upon motion.]

Setting down the cause.

[The ancient course was to present the cause to be set down at the end of the term, when the Lord Chancellor, &c. appointed hearings for the ensuing term.]

[Toth 31.]

Ad requisitionem defendentis.

[If the plaintiff does not set down his cause for hearing in two terms after publication passed; it may be set down *ad requisitionem defendentis.*]

[Px. Alm. 25.]

[If

[If the party who procures a cause to be set down for hearing, is not ready to hear it at the day, but desires it may stand over to another day; he must ordinarily pay the other, who appears, the costs of the day, if the Court see fit to indulge a further day.] Costs of the day for not attending the hearing.

[Where a cause is set down at the defendant's request, if the plaintiff be not served with process, *ad audiendum judicium*, and his counsel attend at the day; and the defendant with counsel attend not; yet the plaintiff shall not have costs; for he was not compelled to appear; and the defendant might choose whether he would go on to have the cause heard.] Costs. [Cl. Tut. 31.]

[The day a cause is set down for hearing upon, must be sooner or later, according to the priority of publication, with respect to causes presented for hearing.] Publication. [Px. Alm. 8.]

[A note or paper of all causes, pleas, demurrers, exceptions to reports, and the like, that are ordered to be set down for hearing, shall be set up and affixed by the registers in their office, two days before the same are respectively appointed to be heard. And in order thereto, all clerks, solicitors and others, are to bring to the Register's office in due time, all orders for setting them down; else the said causes, &c. shall be put off till further order.] Setting down the cause. [Or. Ch. 158.]

[In order to have a cause heard, the six clerk in the cause must be applied to six days at least before the end of the term, that he may inform himself of the state of the cause; of the long or short dependence thereof in court, of the antiquity of publication, of the weight or value of the cause, and all other circumstances material to inform the Lord Keeper or Master of the Rolls of, at the time of setting down of causes.] [Or. Ch. 110.]

[The six clerk may not refuse to offer the same to be set down; if he be attended in such time as aforesaid; nor come unprepared to inform the Court of the nature and circumstances of the causes: for which neither he nor any of the under-clerks, nor any of the registers, are to take any fee, gratuity, or reward.] No fee to the six clerks. [Or. Ch. 110, 111.]

[No money or other reward shall be exacted or taken by any of the six clerks, or by any of the registers, for, or in their behalf, for the preferring and setting down of any cause for hearing; but only such fees as are behind and unpaid of their termly fees and duties: and if any cause happen to be set down for hearing, wherein they shall not have been paid their fees and duties,

duties, they may alledge the same in stay of the hearing of the cause.] [Or. Ch. 111.]

[The old order was, that at the hearing, certificates should be brought, that the bills and answers were duly filed with the six clerks, and the books duly signed; else the cause was not to be heard, and the party was to pay good costs.] [Or. Ch. 63.]

[But by a late order,—no motion shall be made to hasten a cause to hearing, which is either adversary or by consent; nor any cause entered with the Register for hearing, notwithstanding any order, without a certificate first had from the six clerks, that the pleadings are duly filed, for which no fee is to be taken.] [Or. Ch. 185.]

Cross causes.

[Said, cross causes ought to be heard together, if the answer in the last commenced cause be come in, before the first cause is heard.]

Vide *Cross Bill*, *Examination of Witnesses*.

[If there be cross causes, and publication is passed in both; and one of the plaintiffs omits to serve subpœnas to hear judgment; his cause shall not come on at the same time with the other: except the other party consents.] [Pr. H. Ch. 21.]

[About the year 1636, four causes were usually set down to be heard each day: and though causes were delayed a term by the infection; six only, each day, were set down for the ensuing term.] [Or. Ch. 25.]

[Where a cause is ordered to be speeded, or heard in some short time, at the request of either party; he is ordered to do every thing *gratis* on his part, in order thereto.]

Subpœna to hear judgment.

[If the party live, or be in town, he must be served with a *subpœna ad audiendum judicium*, ten days before hearing; if out of town above twenty miles, fourteen days. Vide *Subpœna*. [Pr. Alm. 26.]

[Said, producing in court the *subpœna ad audiendum judicium*, hath been held, *primâ facie*, evidence of service, but an affidavit of service is now required.]

[When a cause comes to be heard before the Master of the Rolls, the clerks in court on each side shall attend the hearing (as they do before my Lord Keeper), to the end his Honour may be informed, if there be occasion, that the cause is ready for his judgment; and that the parties appear *gratis*; or that they were regularly served with process, as the case shall require.] [Or. Ch. 169.]

[The

[The manner of hearing is generally thus: both parties appearing, &c. one of the younger counsel, with the plaintiff, opens the bill, and one with the defendant, the answer; then another with the plaintiff, states the case, and the matters in issue, and shortly touches on the proofs; and then they proceed to read, first on this side, then on that, the proofs to such material points as are controverted.—The counsel on each side debate the matter; the plaintiff's always concluding: and then the Court pronounces the decree; the minutes of which the Register sets down.] Manner of hearing.

[If it is upon bill and answer only, then after the bill is opened, the answer is to be wholly read, and must be admitted true in all points; and no other evidence is to be given but matter of record, to which the answer refers, and which is proveable by the record. Vide *Replication*.] Bill and answer. Or. Ch. 100. Pr. H. Ch. 18.]

But it has been held that deeds may be proved *viva voce* at the hearing of a cause upon bill and answer, at the Rolls. Fielder v. Cage, Hil. 1797.

[Where a cause comes to hearing here, which hath been formerly decreed in the Exchequer, such decree is first to be read, and then the Court proceeds to hear the rest of the evidence on both sides.] Decree in the Exchequer. [Cary. Rep. 30, 78.]

[If the subpœna to rejoin be not served, &c. though it be sued out, the cause must be heard on bill and answer, and no proofs admitted to be read.] Subpœna to rejoin. [Toth. 46.]

[If upon hearing, the plaintiff does not appear, the defendant (except the cause was set down at his request) shall be dismissed with costs.] Plaintiff not appearing.

[If the defendant appears not, then affidavit being made, that he was served with the *subpœna* to hear judgment, or the *subpœna* itself being shewn, the bill is opened, the answer is read, and proofs read to what the answer confesseth not; and if the matter appears plainly for the plaintiff, the Court may decree it for him. But then a day shall regularly be given the defendant to shew cause to the contrary; such a day as the Court shall think fit, (perhaps the last of the term, or the first of the next,) the defendant paying the plaintiff, or his clerk in court, such costs as the Court shall assess upon this hearing.] Defendant not appearing. [*Said, this is not so, unless the subpœna was really served.*]

[And the order is to be penned by the Register accordingly, *viz.* it is decreed so and so, &c. unless the defendant shall, &c. pay, &c. and shew good cause, &c.] [Or. Ch. 112. Px. Alm. 25. Pr. H. Ch. 19.]

[And

at the day, the Court may think fit to proceed by order, without writ.]

For more upon this head, vide *F. N. B.* 66. 2 *Lill.* 23. 4 *Mod.* 183. *Prec. Ch.* 492.

Instead of this writ, which is now seldom or never used, the writ of habeas corpus usually issues.

INFANT.

VIDE

Parties.
Homine Replegiando.
Prochein amy.

Parol demurr. [SAID, if a bill be exhibited here against an infant, to examine the title of lands descended to him from his ancestors, he may by answer shew his infancy, and pray judgment whether the parol should not demur until he come of age.]

[So if in such case, the bill be against any other as guardian, friend, or overseer of the infant, such party may shew the special matter, and conclude judgment, *si le Court viole procede* therein, before the infant come of age of 21 years. But for other matters against an infant, the suit shall proceed.]

[Cl. Tut. 13.]

A bill by a bond-creditor against the heir and executor of the obligor, to have satisfaction for the debt due upon a bond out of real and personal assets; the heir insists that as to him the parol ought to demur, for that he is an infant, and the bill charges his interest, which came to him by descent from the obligor; the parol shall demur until the defendant comes to full age as well here as at law: and, ordered, that the cause stand in *statu quo* until the infant heir comes of age; but as to the other defendant, the executor, he was decreed to account, and make satisfaction out of the personal estate, as far as the same would extend.

Per Lord King, Chancellor, Tr. 12 Geo. 1. Hayward v. Dixon.

1 Vern. 173. 428. 3 P. W. 368. Gilb. 66. Ca. temp. Talb. 198. 3 Atk. 117.

A bill may be brought on behalf of an infant *en ventre sa mere*, and an injunction to stay waste may be obtained. Injunction. 2 Vern. 711.

If there be a mistake by an offer of an infant in his bill, the Court will take care of him. Mistake in an offer for an infant. 2 P. W. 386, 7.

[It should seem that an infant may sue here either by himself, by *prochein amy*, or by guardian, as the Court pleaseth.] Prochein amy guardian. [Toth. 10, 108, 109.] Prec. Ch. 376.

A *prochein amy* need not be a relation, but he must be a person of substance because liable to costs. 1 Atk. 570.

An infant ought to sue by his next friend, and need not wait till he is of age. 1 Ves. jun. 194.

[So it should seem that he may defend; and if he be of discretion he shall answer upon oath.] *Sed quære.* [Toth. 10. 108, 109.]

Said, if an infant of tender years will not appear to a bill, he is to be brought into court by subpœna or order, to be inspected, and the Court will appoint him a guardian. [Cl. Tut. 13.]

[An attachment has been awarded against an infant to make him choose his guardian.] [Toth. 15.]

[An infant of twelve years was ordered to answer not upon oath.] [Toth. 11.]

Where a bill is brought against an infant (according to the present practice) he must, if in town, appear in court, and have a guardian assigned him, by whom he must defend the suit; if in the country, he must sue out a commission to assign a guardian, and put in his answer; and whether he pleads, answers, or demurs, still it must be done by his guardian; for if it be a plea, answer, or demurrer of the infant, without his guardian, it will be irregular. Harr. 711.

If an infant, being served with a *subpœna*, will not appear to a bill, on affidavit of serving the *subpœna* an attachment issues against the infant, (which is in fact never executed,) and counsel moves upon the attachment for an order for a messenger to bring the infant into court; and being brought into court, and no one offering on his behalf to be assigned his guardian, the Court usually orders the senior six clerk, *not towards the cause*, to be assigned his guardian, to appear to the said bill, and answer and defend the suit. Attachment. 2 Harr. 708.

So if an infant appears to a bill, and refuses to answer, an attachment issues against him for not answering, (which is never in fact executed,) but counsel moves the Court upon the attachment for a messenger to bring the infant in court, and the Court will make such order accordingly.

But

Appearance.

But commonly some relation or friend of the infant prays the Court to be appointed guardian for him, to answer and defend the suit, which the Court orders; and such answer must be always sworn by such guardian: so an infant's answer cannot be given in evidence against him; and the reason is, because in reality it is not the answer of the infant, but of the *guardian who is sworn*, and not the infant; and the infant may know nothing of the contents of the answer put in for him by his guardian, or may be of those tender years as not to be able to judge of it.

2 Harr. 709.

3 P. W. 237.

Subpœna ad aud. judicium.

So where an infant is defendant, the service of the *subpœna* to hear judgment must be on the guardian, and not on the infant; but where a defendant puts in an answer to a bill brought by an infant, who does not reply to it, in such case, it seems the answer must be taken to be true, in regard the defendant, for want of a replication, is deprived of an opportunity of examining witnesses to prove his answer; and he ought not to suffer for such omission in the plaintiff. Sed vide 2 *Atk.* 377. *contra.*

3 P. W. 238. in notis.

[If an infant has a guardian assigned him by the Court, or appointed by will; yet where he is plaintiff, the course is not to call the guardian by that name, but to call him next friend, &c. But where the infant is defendant, the guardian is so called. Yet if the guardian be so called, where the infant is plaintiff, is is no cause of demurrer.]

[Toth. 9.]

Witness.

The next friend of an infant plaintiff is considered as so far interested in the event of the suit, that he or his wife cannot be examined as a witness; and if their examination is necessary for the purposes of justice, his name must be struck out of the bill, and that of another responsible person substituted, which the Court, upon application, will permit to be done; and as some check upon the general licence to institute a suit on behalf of an infant, if it is represented to the Court, that a suit preferred in his name, is not for his benefit, an inquiry into the fact will be directed to be made by one of the Masters; and if he reports that the suit is not for the benefit of the infant, the Court will stay the proceedings.

4 Atk. 511. Mit. Treat. 26, 27.

3 P. W. 140. 2 Harr. 711.

Where there are two suits.

So if two suits for the same purpose are instituted in the name of an infant, by different persons acting as his next friend, the Court will direct an inquiry to be made

made by a Master, which suit is most for his benefit, and when that point is ascertained, will stay proceedings in the other suit. Mit. Treat. 26, 27.

The next friend is liable to the costs of the suit and to the censure of the Court, if the suit is wantonly or improperly instituted; but if an infant attains twenty-one, and afterwards thinks proper to proceed in the cause, he is liable to the whole costs. Costs. Mit. Treat. 26. 2 P. W. 297. Strange, 708.

[Said, if an infant be sued here, and the Court assigns him a guardian, and a decree passeth against him, he is bound. *Contra*, where an infant exhibits his bill by his guardian.] Decree. [Cl. Tut. 13.]

[An infant hath been committed to the Fleet for not obeying a decree.] [Toth. 108.]

[An infant suing here by guardian or *prochein amy*, after publication passed, came of age; the cause coming to hearing, &c. it was alleged by the defendant's counsel, that the suit was abated and no cause in court: but the Court gave no way to this exception; and to avoid circuity of action, proceeded to hear the cause.] Abatement.

[And, in such, it seems the course is to proceed without any change.] [Moor Rep. 42. Cl. Tut. 15.]

[An infant pleaded, came of age, and without any cause shewn, prays to amend the plea: granted, but ordered he should pay the plaintiff the three pounds costs.] Plea of infant amended.

[Said, if an infant runs into contempt, there shall commonly go process of contempt, and a Serjeant at Arms, as in other cases.] *Sed quære.* Contempt.

[Said, if an infant be plaintiff, he is bound by the decree of this court, unless there be a saving clause for him in the decree; which, if there be, he may, upon petition to the Lord Keeper, within six months after he comes of age, have the cause reheard.] Decree.

[Said, there ought of course to be such saving clause for an infant defendant, upon which he may have like remedy.

[If there be no such clause for him in the decree, it is erroneous, and he may help himself by bill of review.]

An infant cannot be foreclosed without a day to shew cause after he comes of age; the way in such case is to decree the lands to be sold to pay the debt, and that will bind the infant: where lands are devised Decree. Foreclosure. 1 Vern. 295. 2 Vern. 232. 342. 429. 479.

for payment of debts, there is nothing which descends to the heir, and an immediate sale may be decreed without giving him a day to shew cause; but if he had been decreed to have joined in the conveyance, he must have had a day to shew cause when of age.

Prec. Ch. 185.

Decree *Nisi.*

Where there is a decree *nisi causa* against an infant, on such infant's coming of age, and before the decree is made absolute, he may put in a new answer, make another defence, and examine witnesses.

1 P. W. 505.
2 P. W. 401.
2 Atk. 531.

Decree.

An infant aggrieved by a decree, is not obliged to stay till he is of age before he seeks redress, but may apply as soon as he thinks fit, either by rehearing, bill of review, or by original bill, in which it would be enough for him to say the decree was obtained by fraud and collusion, or that no day was given him to shew cause against it.

1 P. W. 737.

Infant trustees.

Infant trustees or mortgagees are enabled to convey, under the direction of the Court of Chancery or Exchequer, the estates they hold in trust or mortgage, to such person as the Court shall appoint.

7 Ann. c. 19.

The Court will not, on motion or petition, order an infant trustee to convey, unless in the plainest cases where the trusts appear in writing, but otherwise will leave the *cestui que trust* to get a decree by bill.

Prec. Cha. 284.
2 P. W. 549.
3 P. W. 387.
2 Vez. 559.

An infant trustee within the statute, being tenant in tail, ordered to suffer a recovery.

Amb. 624.

An infant trustee ordered to convey, although the estate was abroad.

2 Bro. 325.

Upon petition that the infant trustee might convey to the *cestui que trust*, or mortgagor, on payment of the money to the executors; the petition stated the conveyance in trust to three persons, that such a one being the survivor was dead, and the estate in-law devolved upon the infant, who was in court; the declaration in trust was read, and the consent of the next heir-at-law to the infant required, and then an order was made for the infant, by her guardian, to convey, and the conveyance to be settled by the Master.

Prec. Cha. 284.

Guardian.

The King as *pater patriæ* has the care and guardianship of charities, infants, idiots and lunaticks, and by him such care and guardianship is delegated to the Court of Chancery.

2 Vern. 342.

Ibid.
2 P. W. 119.
2 Vez. 484.

An infant may by *prochein amy* call his guardian to an *account*, even during his minority.

If

If a ſtranger enters and receives the profits of an infant's eſtate, he ſhall be conſidered as a truſtee for the infant. 2 Vern. 342.

Where an eſtate is given to an infant upon a condition, ſuch act as an infant can perform, muſt be done by him; and infancy in ſuch caſe is no excuſe. Ibid.

The right which the King has as *pater patriæ* to take care of charities, infants, idiots, and lunaticks, falls under the Court of Chancery, which in conſequence thereof hath uſed, upon petition only, *without* any bill or decree, to make order touching ſuch rights. 2 P. W. 118. 3 Atk. 813. 3 Bro. 500.

Whoever enters on the eſtate of an infant, enters as guardian or bailiff of the infant. 3 Atk. 130.

The guardianſhip of an infant, notwithſtanding he marries, does not determine till his age of twenty-one, otherwiſe of a daughter. 3 Atk. 625. 1 Ves. 91.

The ſtatute 12 *Cha. 2. cap. 24. ſect.* 8. confines the power of appointing a *teſtamentary guardian to the father only*, and therefore the appointment by the mother, of a guardian, was void, and the infant, being of the age of fourteen, choſe a guardian in court. 3 Atk. 519.

A guardian will not be appointed after the marriage of the infant, nor diſcharged becauſe of a marriage; the Court ſometimes, though rarely, removes a teſtamentary guardian; but if he miſbehaves, orders regulating his conduct are frequently made. 1 Ves. 160.

If no teſtamentary guardian or mother, the infant having ſocage land, may chooſe a guardian at twelve, if a female; at fourteen if a male; and this is frequently done on the circuit. On a queſtion with whom the infant ſhould reſide, the inclination of the infant, who was a young lady of near ſeventeen years of age, was conſidered of weight. 2 Ves. 375.

A grandfather cannot appoint a guardian of his grandſon, it being of right veſted in the father: but he can give his eſtate on what conditions he pleaſes. Amb. 306.

A petition to aſſign a guardian, unleſs to carry on a ſuit, or protect an intereſt, muſt be purſuant to the ſtatute. 1 Bro. 556.

When a father, by will, appoints guardians to his natural child, the Court will appoint them guardians without any reference to the Maſter. 2 Bro. 583.

Money expended for the maintenance and education of the infant, allowed out of a ſmall legacy given to the infant, though it breaks into the principal. *Maintenance.* 1 Vern. 255.

Where an infant recovers by a decree of the Court, the Court may allow him a maintenance out of the truſt eſtate, though no proviſion in the truſt for that purpoſe.

2 Vern. 236.

Where younger children are left deſtitute, and the eldeſt an infant, equity will make ſuch a liberal allowance to the guardian of the eldeſt, as that he may be enabled thereout to maintain all the children.

1 P. W. 493.
2 P. W. 22.
1 Atk. 507.
2 Atk. 330.
3 Atk. 716.
3 Atk. 438.
3 Atk. 511.

So when a legacy hath been deviſed over, in caſe of the legatee's dying before twenty-one, the infant legatee hath been allowed maintenance out of the intereſt.

2 P. W. 23.

The allowance to be made to a guardian muſt be in regard to what the infant had at the death of the father, and until the contingency, by which their property is increaſed, falls in; and ſhall not exceed the income of their original portions.

3 P. W. 369.

Where a father is ſufficiently competent, the Court will give no directions as to an infant's maintenance, for whether an infant ſhall have an allowance of maintenance during the life of the father, depends always upon the particular circumſtances of the caſe. The rule however ſeems to be not to give maintenance, when the father is of ability to maintain his child.

1 Bro. 387.
3 Bro. 416.
1 Atk. 515.
3 Atk. 60.
4 Bro. 223.

The Court upon *ex parte* application, allows maintenance for infants where no cauſe is depending.

2 Atk 315.
3 Bro. 88. 500.

In the caſe of a child, let a teſtator give a legacy how he will, either at twenty-one or marriage, or *payable* at twenty-one, or *payable* at marriage, and the child has no other proviſion, the Court will give intereſt by way of maintenance.

3 Atk. 102.

A ſpecial direction to the Maſter, in ſettling an allowance for the maintenance of an eldeſt ſon to conſider the birth of a poſthumous child, refuſed; but the Chancellor referred it *generally* to the Maſter to conſider of a proper allowance.

1 Bro. 179.

A mother married to a ſecond huſband, is not obliged to maintain the children of the firſt, but is entitled to an allowance out of their fortunes.

1 Bro. 268.

Exceptions will not lie to a Maſter's report of maintenance, and a title ſet up againſt that of the infant cannot be taken notice of before the Maſter, but muſt be eſtabliſhed elſewhere.

1 Bro. 577.

No

No allowance can be made to a parent for maintenance of an infant for the time past. 2 Bro. 231.

The Court will not give maintenance for the time previous to the report of the father not being of ability to maintain his children, except on particular circumstances. 3 Bro. 60.

Marrying an infant ward of the Court is a contempt, though the parties have no notice that the infant was a ward of the Court, and though the father of the infant be living. Marrying a ward of Court. 2 P. W. 110. 3 P. W. 116. Amb. 301.

On this Court's committing the custody of an infant to any one, such committee enters into a recognizance, that the infant shall not marry without leave of the Court. 1 P. W. 698 2 P. W. 112.

Where an infant was inveigled from her guardian *not assigned* by the Court, the husband, the parson, and the agents were all committed. If there be only an apprehension that an infant will be married unequally, either by the guardian, or his neglect, a court of equity will interpose, and send for the infant, and commit him to the custody of a proper person or relation, in order to prevent such danger. 2 P. W. 113.

A man was committed for assisting in conducting the infant out of her guardian's house, and giving her away at the wedding 2 Atk. 158.

Mere filing of a bill is sufficient to make an infant a ward of the Court. Amb. 303.

Personal- attendance, of a person running off with and marrying a ward of the Court, dispensed with on particular circumstances, and on offering to go before the Master and make a settlement. Amb. 602.

There must be a reference to a Master for a proper settlement, before a contempt for marrying a ward of the Court can be cleared. 1 Ves. jun. 155.

The Court often gives extra judicial directions for an infant, and hears a person as *amicus curiæ*; as in the case of Lord *Dudley*, a stranger came and complained of the guardian, and the abuse of the infant's estate; upon this application, and his undertaking to pay costs. the Court directed the Master to examine the receiver's accounts, to see whether the infant was wronged or not. A stranger may apply to the Court on behalf of infants. 2 Ves. 484.

Exceptions will not lie to the answer of an infant. Answer. Bunb. 338. 4 Bro. 256.

An infant's answer cannot be given in evidence

against him, because it is the answer of the guardian who is sworn, and not the infant. 3 P. W. 237.

Laches. Laches will run against an infant where possession is recovered in the lifetime of the infant's father. 1 Vern. 296.

Infancy in a defendant is no excuse for plaintiff's delay. 2 Vez. jun. 12.

Statute of limitations. If an executor, administrator, or trustee for an infant, neglect to sue within six years: the statute of limitations shall bind the infant. 3 P. W. 309.

An infant who neglects to enter six years after he comes of age, is as much bound by the statute of limitations from bringing a bill for an account of profits, as he is from an action of account at common law. Prec. Ch. 518.

Necessaries. If an infant borrows money, and applys the same in payment for necessaries, he is liable in equity though not law. 1 P. W. 559.

An infant is liable for necessaries, but more consideration will be had for a stranger who advances him money, than for his trustee charged with paying him a sum of money when he comes of age. 1 Vez. jun. 249.

Deed. The deed of an infant is not void, but voidable only: for an infant cannot plead *non est factum* to his deed, as a *feme covert* may. 3 P. W. 208.

Fine and recovery. A petition to the King to direct his Judges to take a fine or recovery from an infant, referred to the Lord Chancellor, he reported to the King that he thought the petition reasonable. 1 Vern. 461.

Mr. Serjeant *Maynard* observed, that a fine could not be taken from an infant; but that a common recovery might be had, as desired, by the King's special direction.

Said, an infant may declare the use of a fine or common recovery, where he suffers it without a privy seal, and the use is good, and the fine and recovery shall stand. 3 Atk. 710.

Ibid. An infant may present to a church.

Devastavit. Though an infant at seventeen may administer, yet he cannot commit a devastavit till he is twenty-one. 1 Vern. 328.

Will. An infant may make a will of his personal estate at seventeen, the books say fourteen for a male, and twelve for a female. 1 Vez 303. Prec. Ch. 316.

Inheritance not bound. There is no instance of this Court's binding the inheritance of an infant by any discretionary act of the Court. As to personal things, as in the composition for debts, it has been done; but never as to the inheritance. Infant's property cannot be changed. 1 Vez. 461. 2 Vez 23. 1 Vez. 305.

Infants

Infants may, in some cases, be bound, if *conusant* of their rights: as where tenant in tail, aged nineteen, engrosses a mortgage of the estate. Infant is bound by a fair and reasonable marriage settlement, but the covenants should not be construed too strictly. 2 Ves. 212. 1 Bro. 152.

Infants are bound by a decree taken by consent, although no reference to a Master to inquire whether it was for their benefit. *Bound* by decree. 1 Bro. 484.

An infant may be foreclosed by decree, he can only shew error: a purchaser of the estate, however, will be liable to be overhauled in the account. 3 Ves. jun. 317.

INJUNCTION

(*Vide Bill*)

[IS either to stay a suit in some other court, as in a Court of Law, Court of Admiralty, an Ecclesiastical Court, or a Court of Equity: or,] What. [1 Ex. Alm. 55, 6.

[It is for possession of land, or to restrain one from doing a sudden waste, or damage to the freehold or inheritance of another, by felling timber, ploughing meadows, *&c.*]

[It sometimes precedes, other times it is subsequent to the decree.]

[Where a bill is taken, *pro confesso*, by reason of the defendant's contempt in standing out all process; if the bill prays an injunction to quiet a possession, or to stay the defendant's proceedings at law, the Court will decree a perpetual one.] Perpetual injunction.

[It is commonly by writ founded on an order of this Court; but may be by word of mouth, when the party to be inhibited is actually present in court.] How granted. 3 Atk. 567.

[No injunction of any nature shall be granted, revived, dissolved, or stand upon any private petition.] [Toth. 35.] 2 Ves. 112.

[Injunctions for possession, or for stay of suits after verdicts, are to be presented to the Lord Chancellor, together with the orders whereupon they go forth, that his Lordship may take consideration of them before they go and sign them.] Presented to the Chancellor. [Toth. 35.]

[No injunction, or other writ, shall be presented by the Register to be signed, without the proper hand of

[Or. Ch. 49. 123.] the six clerk in the cause, or of his deputy, subscribed thereto.]

Service. [1 Px. Alm. 38.] [This writ is served by being shewn under seal, and a copy of it delivered.]

[It must be served personally on the party himself, his counsel, attorney, solicitor, &c. or such of them as can be found; or as the case may require.]

[Said, leaving it with the attorney, or solicitor's clerk or servant, is good service.]

It is served (according to the present practice) by delivering a true copy thereof to the party personally, and shewing the original under seal, and the original need not be delivered in order to compare the same.

Hind. 595. 2 Ch. Ca. 203.

Service must be personal on the party, unless the Court, upon particular circumstances, dispenses with personal service; as where the plaintiff at law cannot be found, or resides abroad, upon affidavit, the Court will substitute a service upon his solicitor or attorney.

Hind. 595.

Where the plaintiff at law is abroad, and an injunction bill filed, and a motion that service of the *subpœna* upon the attorney at law should be good service, an affidavit of the truth of the bill must accompany the motion for the *subpœna*, in conformity to the practice of the Court of Exchequer. *Sed vide* 3 *Bro.* 24. where it is held sufficient if the affidavit accompany's the motion for the injunction.

2 Bro. 640. 3 Bro 12.

To stay proceedings at law.

[Where it is prayed to stay proceedings, it is commonly upon some matter suggested in the bill; as that the complainant is not able, for some reasons shewn, to make his defence in the other court; though he hath a good discharge here in equity: that the other party has a penalty on him, which he proceeds for at law, and threatens to make the complainant pay: or that the other Court has not jurisdiction of the cause, but it is cognizable here: or that the other Court refuses him some rightful advantage; or does injustice to him in the proceedings; or has not power to do him right: *et similia.*]

[And it is obtained upon matter confessed in the defendant's answer, or upon some matter of record, or upon writing shewn in court, whereby it appears there is some probability, that the party ought to be discharged in equity; though perhaps not elsewhere: or,]

[Toth. 36.]

[When

[When the defendant is in contempt, or has prayed a *dedimus* (to excuse his contempt) and has not yet answered such bill.]

[Or where the defendant appeareth to be old, and hath slept long.]

[Or the creditor and debtor have been dead long before the suit.]

[Or where the defendant cannot be found to be served with the *subpœna*.]

[In any of which cases, the Court will ordinarily grant an injunction.] [Toth. 36.]

[If it be granted before answer, it is commonly till answer and further order.]

Though the Court will not proceed against a member that has privilege of Parliament, if a parliament-man sues at law, and a bill is brought here to be relieved, the Court will enjoin the proceedings at law till answer or further order. Member of Parliament. 1 Vern. 329.

When a bill is referred for impertinence before the time for answering is out, plaintiff cannot have an injunction of course, but on notice and affidavit. Impertinence. 1 Bro. 574.

Neither can it be granted, unless prayed for by the bill, and the prayer of general relief does not extend to an injunction. General relief. Amb. 70.

Injunction granted to stay trial in actions by a corporation for petty customs till answer, as a defence at law might arise out of the answer. To stay trial. 2 Vez. 620.

Bill to be relieved against a promissory note given on a marriage-brocage agreement; on motion, the defendant was restrained from parting with, or assigning the note, till answer and further order. Bill of exchange. Amb. 66. 3 Bro. 477.

Bill by creditors against the executor, heir, and purchaser of a real estate, charged for payment of debts.—Motion for an injunction on the purchaser of the estate, which had descended on the heir, to restrain him from paying the purchase-money to the heir.—There was an affidavit, that there was little, if any other fund for payment of the debts besides this estate.—The defendant had not answered, but had obtained orders for time. Payment of money.

Injunction ordered, till answer or further order. 3 Bro. 218.

Court granted an injunction to stay the further digging a ditch, but would not order it to be filled up till after answer. Waste. 1 Vez. jun. 140.

After appearance no special injunction can be obtained without notice. After appearance. 2 Vez. 112.

After

After answer.

After answer an injunction is never obtained without giving two days notice thereof in writing to the defendant's clerk in court, in order that he may defend the same.

Hind. 583.

Dissolving injunction.

[Where an injunction is granted before answer; then after answer is come in, if the counsel for the defendant allege, that the defendant has answered and denied the whole equity of the plaintiff's bill, (his contempts, if any, being cleared, and his appearance entered,) and also produce a certificate from the six clerk, that the answer has been filed fourteen days at least; the Court will, on such counsel's motion, order the injunction to stand dissolved at a short day, *nisi causa*, &c. Or perhaps without such certificate, which is now the case.]

[If at the day no cause be shewn; then upon an affidavit of due service of the order, and on motion the order will be made absolute.]

[If in term time and a Rolls-day, it is usually moved to be confirmed at the Rolls, in the evening after the rising of the Court at *Westminster*.] *Sed quære.*

Affidavit of service.

[If the counsel who then moves it, does not shew an affidavit of the service of the order, it must at least be produced to the Register, before the order be drawn up.]

Causes against dissolving injunction.

[But if the appearance be not entered, contempts cleared, answer filed fourteen days, all equity denied; or, that exceptions to the answer are put in. (*Vide Exceptions.*) Or that the answer is reported insufficient; any of these are good causes to be shewn against dissolving the injunction.]

Where plaintiff has equity, or his case is hard,

Hind. 599.

Or because exceptions came in only the night or morning before motion to dissolve.

[If there be two defendants, the Court will not ordinarily dissolve the injunction till both have answered.]

[Toth. 36.]

[An injunction is never dissolved without motion on the adverse part.]

[Coll. Sol. 39.]

[Said, the defendant after having leave for a *dedimus* to take his answer, is bound to take notice of an order for an injunction, though he be not served with the writ.]

How obtained.

[When the defendant prayed a *dedimus* to take his answer, plea, &c. in the country, the order sometime was, that the plaintiff's six clerk, or under clerk, might, without motion, draw a docket and injunction of course;

course; and subscribe his name to the docket, and express in the writ, in the usual form, the cause of granting the injunction; both which, so prepared, were to be presented to be signed: and if the injunction issued forth in any other manner, it was void.]

[But of late such injunction is moved for, (as are all others,) and is granted of course, till coming in of the answer, and further order.] Injunction obtained on motion.

[Upon a plea or demurrer's being allowed, the injunction that was granted till answer, will commonly be dissolved on motion.] Dissolved upon plea allowed.

[But in such case, or upon coming in of an answer, the Court will not dissolve it absolutely on the first motion, (though there be an affidavit of notice) but only *nisi*, &c.] On coming in of the answer.

If a plea be ordered to stand for an answer, the motion must be to dissolve the injunction *nisi*, not absolutely. Mos. Rep. 198.

If exceptions are shewn for cause against dissolving the injunction: plaintiff is ordered to procure the Master's report in four days; or in default, the injunction to be dissolved, without further motion. Hind. 598.

Injunction in a cause abated by the death of either party, unless a motion to revive the same within a stated time, will be dissolved. Ibid.

Injunction for want of an answer, dissolved, because not served till several months after answer came in. 2 Kel. Rep. 43.

The Court will not dissolve an injunction continued on exceptions, if they have not been filed a reasonable time before motion made. Hind. 599.

On cross bills, if when first answered, second is not answered in eight days, injunction will be dissolved on motion. Ibid.

If Master's report is not procured in four days, after exceptions filed; or if answer is reported insufficient, injunction will be dissolved absolutely; and sometimes on the first motion. Ibid.

Injunction cause stood over for want of parties; the Court refused to dissolve the injunction, or appoint a receiver on motion, without a special cause of waste, but compelled the plaintiff to speed the cause. 1 Ves. jun. 401.

Injunction to restrain the defendants from infringing a patent, till the validity of the patent was determined at law: verdict for the patentee, subject to the opinion of the Court upon a case: the Court equally divided, the

the patentee was therefore obliged to bring another action: upon a motion to diſſolve the injunction, the Lord Chancellor ſaid, he would not impoſe any terms upon the patentee, nor diſſolve the injunction.

3 Ves. jun. 140.

Where a commiſſion to *India* was not returned in two years, the Court diſſolved an injunction which had been obtained in the cauſe in the Exchequer.

1 Anſt. 276.

If an injunction be granted for want of an anſwer, and defendant afterwards demurs, and the demurrer is allowed, yet the injunction is not diſſolved till an order has been obtained for that purpoſe.

2 Anſtr. 585.

When an anſwer has been referred for impertinence, the Court will not diſſolve the injunction.

2 Anſtr. 591.

Injunction diſſolved upon the bill being amended.

3 Anſtr. 651.

In ſome particular caſes the Court will continue the injunction after the defendant hath fully anſwered the equity of the bill.

Hind. 596.

Where it does no ſtay trial.

[Where an injunction is obtained with reſpect to a ſuit at law which is at iſſue, or wherein a declaration is delivered, it commonly gives leave to go to trial, but ſtays execution.]

[Com. Att. 441.]

[The Court refuſed to grant an injunction whilſt a demurrer was depending: for until the demurrer be argued, it does not appear whether the Court has cognizance of the cauſe or not; till when, no order ought to be made. So that it was even doubted whether it could in ſuch caſe be granted for a ſpecial cauſe.]

3 P. W. 396.

So of a plea.

Continuing injunction.

[Where upon the face of the anſwer there appeared a ſtrong preſumption of equity for the complainant, the Court continued the injunction to ſtay trial at law: as, where *A.* made a grant of *paſt-fines* to *B.* with covenant that he had power to grant, but *B.* was not to pay rent till peaceable poſſeſſion. *B.* brings an action at law on the covenant of *A.*'s title or power to grant: *A.* prays to be relieved. The matter being confeſſed by anſwer to be as ſet forth by the complainant, the Court continued the injunction to ſtay trial.]

Continuing injunction.

[Where by the anſwer it appears to be matter of account that is in queſtion, and the demand is very uncertain, the Court will commonly grant or continue an injunction.]

Injunction continued on exceptions to the anſwer, but the mere allegation of plaintiff that the anſwer is insufficient, is not ground to induce the Court to continue it.

2 Ves. 454.

[Said,

[Said, where it is to be obtained by motion for matter in the answer, the counsel must put the case in writing to the Court. But I think the practice is not so now.] How obtained.

[Where it is granted on the merits of the cause, or upon special cause in equity, it is commonly to stand till hearing, unless the plaintiff delay his suit.] Where it continues till the hearing.

[Where the matter is tried at law, this process stays execution.] Stays execution. [Com. Att. 441.]

[If goods are taken, or money levied or paid in execution, and in the Sheriff's hands, it will stay them there.] [Ibidem.]

[Said, where money was levied, and in the attorney's hands, who would have retained it for monies owing him by his client; yet the money being in dispute in this Court between the parties at law, the Court ordered him to bring it in here.]

[Where there is a verdict at law, and the defendant exhibits his bill for relief here, the money must be deposited here before an injunction will be granted; except in some cases, where special matter of equity appears by the defendant's answer, or some former decree, or such like.]

[Suits in the Court of Chancery in the Petty-Bag, by *scire facias* or *privilege*, are not to be stayed by injunction, but by order.] Petty-Bag. [Toth. 37.]

[The defendant having prayed a *dedimus*, the complainant moved for an injunction: the Court (though the defendant had bail at law) would not grant it on other terms than that the complainant should bring into Court the money recovered at law; because the complainant was going beyond sea.] In what cases granted. Where money must be brought in.

[No injunction for stay of suit at law shall be granted, revived, dissolved, or stayed, upon a petition, nor any injunction of any other nature pass by order upon petition, without notice and a copy of the petition first had by, or given to the other side, and the petition filed with the Register, and the order entered.] Or. Ch. 123.

[Where an injunction is granted by motion, it must be dissolved by motion.] Com. Att. 443.

[The Court would not continue an injunction upon a bill to be relieved against the penalty of a bond prosecuted at law, except either the money swore by answer due thereon was brought into court, or the complainant gave judgment at law, and a release of errors: Continuing injunction.

and if he had not been thought of sufficient ability, the Court would have suffered the plaintiff at law to have proceeded there, so far as the return of a second *scire facias*, to make the bail liable.]

Where the Court orders money to be brought in.

[A surety in a bond prosecuted at law on a counter-bond for money he had paid, and for other matters upon contract and account: the defendant files his bill here, and has an injunction, *&c.* The Court ordered the money sworn paid upon the original bond to be paid the defendant in this Court in a month, subject to the direction of the Court upon hearing, else the injunction to stand dissolved.]

[Where the defendant by his answer swears a certain sum of money due to him, the Court often will not grant or continue an injunction, unless the plaintiff bring the money into court, *&c.* Yet time will be given to bring it in, as the greatness of the sum, or the distance of the party requires; and the proceedings ordered to stay in the meanwhile.]

[1 Pr. Alm. 37.]

[But if the defendant be in contempt, the Court will grant it without bringing any money into court, though there have been proceedings at law.]

[2 Toth. 37.

[So if matter be confessed sufficient for a total relief, *&c.* the Court will do the same.

Where injunction against proceeding at law is obtained till answer of a defendant abroad, plaintiff is not compellable to bring the money into court, except on special circumstances, as that the money is likely to be lost, *&c.* 2 *Anstr.* 366.

Where there is a verdict at law, and the defendant exhibits his bill for relief, the money must be deposited before an injunction will be granted; except in some cases, where special matter of equity appears by the defendant's answer, or some former decree, or such like.

Amb. 242.

After a verdict at law and a bill filed for an injunction, which is obtained for want of the defendant's answer, the money shall be brought into court, or the injunction dissolved, but it must be on affidavits contradicting the allegations of the bill.

1 Bro. 452. 2 Bro. 14. 2 Bro. 182. and the cases cited.

Affidavit.

[Said, an affidavit is not ordinarily to be read against an answer.]

[Yet, where an executor, by his answer, swore a certain sum due, the Court, upon affidavits of strangers to the suit, continued the injunction, without ordering the

the money to be brought into court; because there appeared reason to doubt whether it were due, and the executor is not privy to the transactions of the testator, and so it was said it would have been, if by writing or any other matter shewn the Court, it might seem doubtful whether the money was unpaid.] 2 Toth. 37.

Affidavits were allowed to be read for the patentee of a new invention, on a motion to dissolve an injunction on coming in of the answer, on account of the great prejudice that would accrue to the party, were the injunction to be dissolved, and the book allowed to be dispersed and sold by the defendant. 3 P. W. 255.

Motion to dissolve an injunction to *stay waste* upon coming in of the answer. Affidavits were suffered to be read against the answer, in order to support the injunction. Ibid. in notis.

Affidavits permitted to be read upon an application for an injunction to restrain execution on a verdict at law, after the answers were come in.—Yet said, that affidavits are not allowed to be read against the answer, except in cases of waste, or other irreparable mischief. 3 Bro. 463. and the cases cited. 1 Vez. jun. 427.

In support of a motion for an injunction on an interpleading bill, affidavits of the facts may be read, for it is exactly on the footing of waste. 1 Vez. jun. 102.

Continuing injunction.

[The defendant being considerably indebted to the complainant's testator, disbursed money about his funeral, at the executor's request, for which he brought an action at law against the executor, who brought his bill here; praying an account, and stay of proceedings at law; and had an injunction, which the defendant prayed might be dissolved, at least as to what related to the monies so disbursed. The Court said, it was to be supposed he designed to have it allowed in the account when he laid it out, (and so he should,) and therefore the injunction was continued.]

Where the Court orders money to be brought in.

[Administrator of a sailor orders *A.* to receive money due to the sailor: he does, and puts it into a goldsmith's hands. A will appears; of which and probate the executor gives *A.* notice before the money was paid to the administrator, *&c.* He refuses to pay the money to the executor; the executor sues him at law: he brings his bill: the executor swears notice as aforesaid. The Court ordered the money to be brought into court, or the injunction to be dissolved.]

[Judgment

In what case granted.

[Judgment at law on a bail bond: a bill here, and injunction. The defendant swears eight pounds due for work done. The money was ordered to be brought into court, &c. though the Court inclined to have the injunction continued without that, seeing there was a judgment at law: but in regard it was so small a sum, it was ordered to be brought in.]

In what case granted.

[*A.* was by obligation bound to *B.* for payment of 100*l.* and was indebted to him one hundred pounds more for rent: an action was brought at law on the bond, and judgment had on the bail-bond. The defendant by answer owns the one hundred pounds on the bond satisfied. The Court ordered the defendant at law should give a release of errors, and the injunction to stand as to that, but to be dissolved as to the rent.]

In what case granted.

[Money levied on a *fieri facias* was in the secondary's hands: the complainant prays an injunction until answer. The Court granted it, and said injunctions had been granted where the money was not secured as here it was; and that this was the easiest (with respect to the now defendant) that ever was granted.]

In what case granted.

[If an action on the case be prosecuted at law, and the defendant brings his bill here, &c. and the defendant here by answer swears the money due, the Court will commonly dissolve the injunction, except the complainant will give a judgment at law in debt for the money sworn due, and a release of errors.]

In what case granted.

[The bill alledges that the plaintiff is indebted to the defendant fifty pounds, and the defendant fifty pounds to him; that the defendant is a prisoner in the Fleet, sues at law, has an interlocutory judgment, and will not pay or allow what he owes. The plaintiff prays an account, &c. and has an injunction. The defendant by his answer says, he returned the money due to the plaintiff to him at *London* in *December* last. The plaintiff produced the bond, by which it appeared the money was not payable till *April* next. The Court ordered that upon the complainant's giving a final judgment at law for twenty pounds, the sum demanded there, and a release of errors, in four days, the injunction stand.]

In what case granted.

[If money be recovered at law, and the defendant brings his bill to be relieved here, on condition the plaintiff

plaintiff pay the money and costs recovered at law into court here, subject to order on hearing, this Court will commonly order an injunction, and will in the meanwhile stay execution, and give some time for paying in the money; with this further, that the defendant here to be at liberty to affirm his judgment, if a writ of error be pending; or if there be none, the complainant to give a release of errors.]

[The defendant here had judgment at law: the complainant had brought a writ of error, and then brings his bill here, and has an injunction. The defendant being in no contempt, but having taken a *dedimus*, prays leave to affirm his judgment. It was granted him; but he to proceed no further till further order.]

Ecclesiastical Court.

[Legatees sue in the Ecclesiastical Court, that the executors might (as I suppose) prove the will, and pay their legacies. The executors exhibit a bill here to prove the will, it being of lands as well as personal estate, and to stay proceedings in the Ecclesiastical Court, and offered by their bill (I suppose) to pay the legatees if there should be assets. This Court ordered an injunction, and that it should continue, the executors giving security here to perform the will, and speeding the cause.]

Exceptions.

[Said, exceptions alone are not a sufficient cause for granting an injunction, because they are often put in for delay; but there must be a report also of the answer's insufficiency. *Per Cur.*]

[But where an injunction is already granted, it will be continued on exceptions; and where exceptions came in but the night before the motion, the Court has refused to dissolve the injunction.]

[But if a report is not procured upon exceptions in a reasonable time, or if the answer be reported sufficient, &c. the injunction will on motion be ordered to be dissolved, *nisi causa*, &c.]

Delay.

[Delay of proceedings here for a long time is good cause for dissolving an injunction to stay proceedings at law.] [Com. Sol. 24.]

Cross-bills.

[Where there were cross-bills, the Court said, if after the first bill is answered, the plaintiff in the first do not answer the second bill in eight days, the injunction should be dissolved on petition.]

On what terms granted.

[The Court ordered money ſworn due on an award to be brought into court, or the injunction to be diſſolved; for by the award it is become *res judicata*.]

[Where there is an appearance of equity with the complainant, or that his caſe ſeems very hard, the Court will not eaſily diſſolve the injunction.]

[A leaſe was made for ſeven years: the now defendant had judgment in ejectment againſt the complainant by reaſon of the ſtatute of frauds; for the leaſe was only put into writing by one preſent, without order of the parties. The complainant prayed relief here, and with affidavits produced ſome acquittances or receipts for the rent, which ſay, *according to an agreement* with the defendant. The Court ſaid there might be equity in the matter; for the receipts are evidence of an agreement, and this Court will not interpret the ſtatute of frauds ſo rigorouſly as the Courts of Law: and however, it was hard to turn a tenant out, *&c.* And though the defendant had ſworn the agreement was to continue but for the life of the plaintiff's husband, now dead, and that the rent was to be paid in corn, which was cheap; yet the Court ordered the injunction to ſtand, the cauſe to be ſpeeded, the plaintiff in the meanwhile to pay the rent, and repair according to agreement.]

[Said, mending a bill never moves or touches an injunction. *In Cur.*] *Sed quære.*

[If an injunction is diſſolved, yet if there be cauſe it may be revived on motion.]

In what caſe granted.

[This proceſs is ſometimes granted to ſtay execution, where judgments are entered by aſſent of parties for ſecurity of money borrowed.] [3 Px. Alm. 11.]

Multiplicity of ſuits.

[Where many actions at law are brought by the ſame plaintiff againſt the ſame defendant, for the ſame cauſe, this being in the nature of barretry, the Court here will grant an injunction to ſtay the proceedings in all but one of them.] [3 Px. Alm. 11.]

[Said, if a mortgagor brings a bill here to redeem, it is at law accounted a breach of covenant for quiet enjoyment: but if an action of covenant be in ſuch caſe brought, this Court will grant an injunction. *Per Cur.*]

Plea allowed. Injunction diſſolved.

[The defendant's plea being allowed, he moved to diſſolve the plaintiff's injunction. The Court ſaid, when the plea is allowed, there is ordinarily an end of the

the injunction, but not always. The defendant had pleaded only what the plaintiff had confessed and set forth, *viz.* an award; and though the defendant and referees have denied all practice, and sworn that the plaintiff was heard, and the award duly obtained, yet it was said, practice and unfair proceedings are often found in awards. The counsel for the defendants said, the other side ought to shew some equity confessed or allowed in the answer; but was answered by the Court, that though awards are favoured here because they tend to settle peace among parties, and although there be notice of this motion, yet an injunction is not to be absolutely dissolved upon the allowance of the plea, but only *nisi*; because there may be some equity shewn to continue it. The Court however ordered the money awarded to be brought into court by the first seal, or the injunction to stand dissolved without further motion: the plaintiff to enter up his judgment, (having at law a verdict,) and tax his costs, which were also to be brought in, but to stay execution, though the Court seemed willing to have had him forbear entering judgment.]

[An injunction to stay waste must be had upon a bill filed to that purpose.] Waste.

[It is commonly granted for him in reversion or remainder against tenant for life, or other particular tenant, to stay or forbear waste in houses, wood, or timber, where it is begun to be done, or reasonable cause to fear it will be; or to prevent or hinder the ploughing up of ancient meadows, not ploughed up of twenty years before; or for the preservation or maintenance of inclosure of twenty years standing, or more; or to hinder the doing of any other spoil or waste in lands.]

[Injunctions against the felling of timber, or ploughing of ancient pastures, or for the maintaining inclosures, shall be granted according to the circumstances of the case; but not where the defendant by his answer claimeth a state of inheritance, except where he claims in trust, or upon some other special ground.] [2 Toth. 38.]

[If the defendant shew that he has an estate without impeachment of waste, it is ordinarily a good cause to prevent or dissolve the injunction.] [1 C. R. 212.]

[Yet it is said, this writ is sometimes granted to stay spoil, even against him that may by law or provision

of the parties do it, where the doing it seems malicious, and against the public good; as in cutting young timber, prostrating houses, and such like.]

[1 Px. Alm. 11. Toth. 188.]

[Though a bill is exhibited, yet an affidavit of waste committed or threatened is ordinarily necessary to induce the Court to grant the injunction.]

[But sometimes on filing the bill, without affidavit, and even before *subpœna* served, the Court will grant it.]

8 Px. Alm. 36.

[So in the case of hospital-lands (lately decreed by this Court): the Court, partly from the defendant's own confession, partly because the complainant seemed not to design to renew to the present tenant (the defendant) when his lease was out, the Court, I say, being pretty well satisfied there was danger waste would be done, granted it without affidavit.]

[This writ was prayed to restrain tenant for years from doing waste in a warren, upon affidavit of several great numbers of coneys destroyed at unseasonable times: it was also alledged that he cut timber-trees, &c. (and so I suppose they would have had an injunction for altogether). The Court said an injunction might as well be granted to keep a man in quiet possession of his house; but it being urged that it was a very considerable warren, and that the lessee's term was near an end, it was granted.]

[Said, for staying waste, this writ is to be granted against those only who claim or hold, either immediately or mediately under him that prays it.]

[And though this Court will stay a mere lessee from doing waste, yet not [or not so easily] a mortgagee or his lessee. *In Cur.*]

To quiet possession.

[This writ is sometimes granted to quiet a possession of corporeal things, as houses, lands, &c. But,]

[It is not to be granted for such purpose, save where the possession hath continued in the plaintiff by the space of three years past, before the bill exhibited, and upon the same title, and not upon any title by leave [or at will,] or determined, of which the Court must be satisfied by oath.]

[Toth. 37.] 3 Vern. 156.

[Said, the plaintiff must also have such possession [or rather title continuing] at the time of the motion, and the injunction is to be given only for such a possession [or upon such a title] as he then hath.]

[Where the defendant was in possession at the time of the bill exhibited, and the plaintiff after entered, an injunction

injunction was granted against the plaintiff to avoid the possession.]

[Another time, in such a case, the defendant prayed he might have an injunction, or the bill be dismissed, and the Court held it reasonable he should have one or the other.] [Cary. Rep. 51. 63. 140.]

How it operates.

[Injunction for possession before hearing hinders not the defendant's suit at law, making a lease, taking a distress, &c. and it may, as in other cases, if the plaintiff delay his suit, be dissolved.]

Perpetual injunction.

[Said, a *perpetual* injunction to quiet possession, is only to be granted where there has been a long uninterrupted possession. *In Cur.*]

[But it is sometimes granted upon a decree, where there have been several trials at law.]

[An issue was directed to be tried at law, whether a will or no will, and found no will, and thereupon a perpetual injunction awarded against the defendant not to prove the pretended will in the prerogative Court, (even) touching personal estate.] [1 Ch. Ca. 80.]

[Heretofore, in case of obstinate disobedience in the breach of a decree, an injunction used to be granted, *subpœna* of a sum: and upon affidavit or other sufficient proof of persisting in contempt, fines were to be pronounced or set by the Lord Chancellor in open court, and to be estreated down into the hamper by special order.] [Toth. 44.]

[But I do not find this course has been used of late.]

[Sometimes pending the suit, the Court will order a party the possession, or that the rents not already paid, be stayed in the tenant's hands till hearing; and sometimes it will order both.]

Receiver.

[Other times, it will order a receiver, who shall take the rents and profits and pay them into court, or account for them when the Court shall require; and he to enter into such recognizance as the Court directs, to secure his doing so.]

Contempt.

[The lord of a manor brings ejectments against his customary tenants, upon pretence of forfeiture: the tenants (or some of them) bring a bill here, praying he may shew what breaches of the custom he designs to insist upon at the trial, upon the general issue *in ejectione firmæ:* he being in contempt, the Court without entering into the merits, ordered an injunction.]

[This process is said to have been heretofore very frequently granted to stay suits upon the statute of 2 *Ed.* 6. *cap.* 13. for treble damages for not setting out tythes; [because, as I suppose, it is in nature of a penalty;] and the party sent to the Ecclesiastical Court.]

[3 Ps. Alm. 15. Toth. 113.]

Perjury.

[Where there was a prosecution at law for perjury in this Court, the Court granted an injunction, the cause here not being yet heard.]

[Toth. 114.]

Privilege.

[If a privileged person of this court is sued elsewhere at law, he may stay the suit by injunction; for he should be sued in the Petty-Bag office, and not elsewhere.]

[The plaintiff went over defendant's ground into his house, to serve him with a *subpœna* of this Court, for which the defendant brought an action at law, *quare domum*, &c. *clausum fregit*: and upon motion here, the action of trespass was stayed by injunction.]

[Pr.H.Ch.168.]

Inrolled.

Injunctions shall be inrolled, or the transcripts thereof filed.

Toth. 38.

Dissolved.

[Said, the Court does not at the last seal after term ordinarily dissolve injunctions.]

[Where an injunction is disobeyed, on oath thereof, process of contempt is to issue against the contemnor, as in other cases, till he yield obedience; nor is he to be heard in the principal case, till he yield obedience.]

Bailiffs, who had served an execution in breach of an injunction, find money hid in the house, and carry it away; the party, at whose suit the execution issued, was ordered to make satisfaction.

1 Vern. 207.

An injunction does not prevent an entry.

2 Vern. 519.

In what Cases granted.

IT may be obtained after answer and demurrer on amended bill; but not of course. *Amb.* 104.

2 Vez. 19.

It seems, however, that an injunction cannot be granted upon a *Sedimus* to take an answer to an amended bill, as it is contrary to the rule and practice of the Court: if on the coming in of the answer to the amended bill, sufficient grounds are disclosed, plaintiff may move for an injunction on the merits.

3 Atk. 694.
2 Vez. 19.

Injunction granted on amended bill on *special motion*, without an affidavit in support of the amendment or equity of the bill, after injunction dissolved on the original bill.

3 Bro. 425.

After

After injunction diſſolved *on the merits*, a motion to ſtay trial of ejectment till full anſwer to the amended bill refuſed with coſts. 1 Ves. 19. 1 Ves. jun. 30. 1 Anſtr. 188.

After injunction diſſolved upon the merits, and ſupplemental bill for the ſame matter, the plaintiff cannot *of courſe* move for an injunction till anſwer, but it muſt be moved ſpecially with notice.—And the defendant's aſking for time to anſwer, is not a waiver of the irregularity of the injunction; had he moved to have execution awarded at law, but not actually levied, that would have been acknowledging the injunction and diſpenſing with the irregularity of it. Amb. 105. 2 Anſtr. 553.

Where there is a truſt, notwithſtanding the Eccleſiaſtical Court has original juriſdiction in legacies, this Court will grant an injunction, truſts being proper for the cognizance of this Court. 1 Atk. 491.

Repreſentatives of mortgagee, after foreclouſure, ſell the mortgaged premiſes, and the amount not being ſufficient to pay the debt, bring an action on the bond; the Court refuſed an injunction to ſtay proceedings. 3 Atk. 723. 2 Bro. 125.

Leſſee of a houſe covenants to repair, accidents by fire excepted; the houſe is burnt, leſſor having inſured; receives the inſurance money and neglects to rebuild, upon an action at law for rent, this Court granted an injunction till the houſe was rebuilt. Amb. 620.

After a decree for payment of debts of teſtator, a creditor ſhall be reſtrained from proceeding at law againſt his executor. 1 Bro. 1[illegible]3.

Injunction granted to ſtay proceedings at law, on a bond for performance of covenants to build a bridge, and an iſſue directed to try what damage was ſuſtained; the ſum mentioned in the bond being in the nature of a penalty. 1 Bro. 418. 2 Bro. 341.

The practice of a court of law compelling a plaintiff on a bond not to take execution beyond his real debt, does not ouſt the juriſdiction of this Court from granting an injunction. 3 Bro. 73.

Plaintiff's houſe being ſo near the church, that the five o'clock bell, rung in the morning, diſturbed her; ſhe came to an agreement in writing, with the churchwardens and inhabitants at a veſtry, that ſhe would erect a *cupola* and clock at the church, in conſideration of which, the five o'clock bell was not to ring in the morning. This agreement binding, and an injunction awarded againſt ringing the bell. 2 P. W. 266.

1 Granted to restrain defendant from recovering a demand from one of the plaintiffs, defendant having represented to the agent of the other plaintiff (on a treaty of marriage with his daughter) that there was no such demand existing.

1 Bro. 543.

Injunctions are sometimes granted to stay waste in felling timber and other trees.

3 P. W. 268.
1 Bro. 166.

So, to restrain the executor of a person to whom private letters were written, from publishing them without the consent of the executors of the person who wrote them.

Amb. 737.

So, against a publication pirratically taken from another, but not against a fair abridgment.

1 Bro. 451.

One having sold a bookseller a book of roads printed in letter-press; after the expiration of the first fourteen years, sold it to another, who published the high-roads upon copper-plates, and the cross-roads in letter-press; as to the last an injunction was granted; the author having no resulting right as against his own assignee, after the first fourteen years, and this being part of the former work, although the delineation on copper-plates is a new work.

2 Bro 80.

The Court will not stay working a coal-mine; but will sometimes restrain defendant from opening mines, &c. even if he has only threatened to do it.

2 P. W. 389.
Amb 269.
2 Atk. 183.

Where a man comes into equity for money due to his wife, the Court puts such terms upon him as are just, but it will not enjoin a man from proceeding in the Ecclesiastical Court for a legacy given his wife, nor from releasing a debt due to her.

Andrews v. Cradock, June 12, 1714, MS.

An injunction was granted on behalf of a wife against her husband, to quiet her in her separate estate, and to prevent his forcing her to undo the contract which he had made with her and her trustees.

Atwood v. Atwood, East. 1718, MS.

Defendant was enjoined by the Duchy Court of *Lancaster*, from proceeding at law upon a bond; he afterwards removed from the jurisdiction, and proceeded at law upon the said bond; bill was filed to restrain the said action; defendant's answer admitted the proceedings in the Duchy Court: upon a motion for an injunction, the Chancellor said, that this Court ought not to carry on an injunction awarded by an inferior Court, without entering into the consideration, whether there were good reasons for granting that injunction.

Duckenfield v. Aynsworth, Trin. 1734, MS.

Injunction issued to restrain defendant, the widow and

and administratrix of the intestate, from disposing of his property in the funds, on the ground of having squandered the real estate, of which she was in possession for the plaintiffs, the children. 1 Anstr. 174.

Injunction before answer refused, to prevent a breach of contract where no trespass was committed, and no immediate injury likely to be sustained.— And so to prevent a tenant selling dung off the farm contrary to the covenants in a lease. *Sed vide contra, Gerst* v. *Lord Belfast, in notis.* 3 Anstr. 645. 749.

Injunction granted to prevent the negotiating a note obtained at play, upon affidavit, before service of the *subpœna.* 3 Anstr. 851.

Injunction is sometimes granted to quiet men in their possessions before hearing, as where the plaintiff had been in possession for the space of three years before the bill filed, upon a title yet undetermined. To quiet possession before hearing. Vern. 156.

So an injunction was granted before answer, on behalf of law patentees, to prevent the sale of law-books printed beyond sea, and to stay them in the Custom-House. 2 Ch. Ca. 76.

The Court will grant injunction before answer, for a plain apparent nuisance, on certificate, affidavit, and notice to the party, his clerk in court, or solicitor; but in case of a special nuisance, the Court expects the party to shew his right, and how he is particularly aggrieved, before this writ will be granted. Against continuing a nuisance. Hind. 591.

It may also be obtained to prevent multiplicity of suits, in which case the Court will direct a trial at law to determine them all. To prevent multiplicity of suits. Gilb. Ch. 195.

A man having granted to *J. S.* common in his down for *one hundred* sheep and *five* rams. The bill complained the grantor overstocked the common, so that the plaintiff, the grantee, could have no benefit of the grant, and prayed the grantor might be enjoined not to overstock, *&c.*; upon debate, the Court dismissed the bill. 2 Vern. 116.

Court did not grant an injunction to restrain the defendant from encroaching on plaintiff's right to supply the borough of *Southwark* with water, till he had established his right at law. 2 Atk. 391.

An injunction will not be granted to stay proceedings on a *mandamus.*—Nor to stay the use of a market.—Nor to stay proceedings at law on a bond given for the resignation of an office.—Nor to stay proceedings at law in an action against the auctioneer for the 2 Vez. 398. 415. 3 Bro. 57.

deposit,

deposit, there having been great delay on the part of the vendor.—*Sed vide* 4 *Bro.* 494.

4 Bro. 470.

A. diverted a water-course, which put *B.* to great expence, *&c.* and the diversion being a nuisance to *B.* he brought an action, against which an injunction was granted: it being proved that *B.* saw the work when carrying on, and never shewed the least disagreement, but rather approbation and consent.

2 Eq. Ca. Abr. 522. pl. 3.

This Court will not suffer a man to be sued at law for executing its process irregularly, the irregularity being only punishable here.

Vern. 269.

To stay Proceedings at Law (*a*).

Answer.

FOR forcibly taking money from defendant which he had won at play, though the answer denied all the circumstances charged by the bill; granted.

1 Vern. 489.

Execution.

Injunction to stay execution and trial not granted on one motion.

3 Bro. 87.

Bail.

Where bail is put in above, an injunction to stay proceedings against the principal extends to stay proceedings against the bail: when the bail is only put in below, it extends to stay proceedings on the bail-bond.

Amb. 32.

After bill by the principal debtor for an injunction dismissed, the bail cannot bring another upon the same equity, unless for collusion.

2 Ves. 630.

Contempt.

Plaintiff obtained an injunction to stay proceedings at law, and was taken on a *capias ad satisfaciendum*, before notice of the injunction. Court refused to discharge him, it was no contempt in the defendant, and the process at law legally issued.

1 Anstr. 36.

Injunction to stay proceedings at law, plaintiff afterwards entered into an order by consent, before a judge, that on perfecting bail, proceedings should stay till within four days of the next term, bail not

(*a*) Injunctions are *never* denied in ejectment cases, where the party agrees to give judgment in ejectment to prevent trial, to give release of errors, and to consent not to bring a writ of error; and to this it is sometimes added, to deliver possession as the Court upon hearing shall direct. This forwards the defendant at law, and he could not have more, if he were to proceed to trial. *Is not this rule, as stated, too extensive? for if an injunction were granted in all cases of ejectment, irreparable injury might sometimes arise; as in the case where a tenant, by setting up a false agreement for a lease, might obtain an injunction against an ejectment brought by his landlord, and keep possession for the sake of deteriorating the estate.*

Gilb. Ca. 195.

being

being perfected, defendant proceeded at law. The Court thought the injunction was dissolved by the consent to proceed at law, although but conditionally. 1 Anstr. 62.

On a bill for discovery and injunction to stay proceedings at law, defendant (the plaintiff at law) stated himself to be a mere agent for the other defendants, and ignorant of the transaction; the other defendant lived abroad: an injunction was moved for as of course; but there appearing danger of losing other material evidence by the delay: It was refused. 2 Anstr. 502.

Where plaintiff at law distrained, and on replevin made three conusances as bailiff to different persons, an affidavit stating the only claim to be under one of the persons, and that he had absconded insolvent, did not entitle the plaintiff in equity to an injunction. 3 Anstr. 636.

A. sued at law on a policy of insurance, which he had made as agent for *B.* the underwriters filed a bill for a discovery and injunction. On motion for an injunction on affidavit of *B.*'s residing abroad, *A.* must have notice. Notice. 3 Anstr. 686.

An injunction cannot be extended to one who is not a party to the suit, as where an action was brought by the holder of a bill of exchange, against plaintiff, the acceptor. He filed his bill, and obtained an injunction for want of an answer, the holder of the bill then returned it to the indorser, who brought a fresh action, and the Court refused to extend the injunction to him. 2 Anstr. 528. 555.

An injunction to stay proceedings at law extends to prevent a suit against the sheriffs for not paying over money levied under an execution in the original suit, before the injunction issued; but it must be paid into court. 2 Anstr. 556. 569.

An injunction upon an attachment, *dedimus*, or upon the defendant's praying time to answer, does not extend to stay proceedings in the Spiritual Court. Spiritual Court. P. W. 301.

If, on the service of the injunction to stay proceedings at law, the defendant hath not commenced his action, he cannot sue out process; if he hath, but not served the same, or in case he hath, but hath not delivered or filed any declaration, he cannot proceed. If there be a declaration, he may call for a plea, and for want thereof sign judgment. If the cause be at issue, he may go to trial, if that hath been had, and verdict obtained, he may proceed to judgment, and affirm if error How the injunction operates. Hind. 585.

2 Kel. 17. error hath been brought; but if judgment hath been executed, and debt and costs levied thereon, sheriff cannot pay the same, execution being stayed till answer or further order.

Notice. An injunction may be extended to stay trial, if the plaintiff makes an affidavit that he believes a discovery will arise out of the defendant's answer, so as to enable him to make a good defence at law; this is a special motion, and requires notice.

Hind. 597.

3 Bro. 23. 4 Bro. 263. Action against an executor before the bill filed for an injunction, plaintiff discontinues, he may prove his costs at law in addition to his debt, under the decree.

Hind. 587. After a verdict at law, the money must be deposited before an injunction will be granted.

If plaintiff pray to stay proceedings at law upon a bond, they shall not be stayed, unless he submits to be bound by the order of Court, not to bring any writ of error.

1 Vern. 120.

In an injunction cause, a *subpœna* may issue before the bill filed, 4 & 5 *Ann. c.* 16. and after it is, and defendant hath appeared, on affidavit of the proceedings at law, and notice of motion, an injunction may be applied for on the merits.

Hind. 586.

To stay Waste.

LESSEE covenants not to plough pasture-lands, if he does, then to pay after the rate of 20*s.* per acre ploughed, *per annum*; injunction against the tenant's ploughing refused, as the parties themselves had settled the damages.

2 Vern. 119.

In the long vacation upon petition with affidavit and certificate of bill filed, an injunction may be granted.

Hind. 583.

Lessee. Lessee for years *sans waste*, remainder to the Bishop of *London*, upon a bill by the Bishop against the lessee to prevent his digging the ground for brick, an injunction was awarded.

1 P. W. 527.

A bill was brought by a ground landlord against an under-lessee, who held by lease from the original lessee, to stay waste, and an injunction was granted.

3 Atk. 723.

Remainder-man. A remainder-man in fee may have an injunction to stay waste in the first tenant for life, notwithstanding an intermediate estate for life; and this without proof, if tenant for life insists upon the right.

3 Atk. 723. 2 Atk. 383.

The

The first tenant for life cuts down timber, the second files his bill in this court for an injunction to stay waste, and it was granted. *Tenant for life.* 3 Atk. 94.

Trustees to preserve contingent remainders may bring a bill to stay waste in the tenant for life. *Trustees.* 3 Atk. 94. 754.

A. devises lands to his son and his heirs, but in case he should not attain twenty-one, and die without issue, then he gives his lands to his daughters, and directs they should be sold, and the money divided amongst them; the son, who wanted three-quarters of a year of twenty-one, intended cutting down 3000 *l.* worth of timber, upon a bill by the daughters to stay waste, he was enjoined. [3 Atk. 209.]

Bill to have an account and satisfaction for waste, in cutting down trees, without praying an injunction, dismissed. 3 Atk. 262.

In a bill to stay waste, the plaintiff is not entitled to a discovery, unless he waives the penalty, which is treble damages by the statute of *Gloucester*. *Treble damages.* 3 Atk. 457.

It is not a sufficient inducement to the Court to dissolve an injunction for staying waste, that the defendant in his answer swears he has not committed any waste since the filing of the bill, for as he admits, that he has done waste before, the Court will presume he may do further waste, and the injunction will be continued. 3 Atk. 485.

Motion before answer to stay waste in digging mines of coal, *upon an affidavit of the title*, waste and a certificate of the bill filed: but as it appeared that the defendant set up a title to the inheritance, the Court refused the motion, till answer or default in putting it in. *Title.* 1 Bro. 57. 3 Atk. 496.

Termor may have an injunction to stay waste against his lessee. *Termor.* Amb. 105.

Tenant for life, without impeachment of waste enjoined from cutting down trees planted for shelter or ornament. *Tenant for life.* Amb. 107. 1 Bro. 159. 1 Bro. 166. 2 Bro. 88. 3 Bro. 549.

The patron of a living may have an injunction against the incumbent to stay waste, or against the widow of a late incumbent, during a vacancy.—So may the Attorney-General against a Bishop. *Patron.* 2 Bro. 552. Amb. 176.

Bill to stay waste may be filed on behalf of an infant *en ventre sa mere*. 3 Atk. 211.

The Court will sometimes order a building, which is erecting, not to be proceeded in, though not direct it to be pulled down. *Building.* 1 Ves. 543. 2 Ves. 452.

The

The Court will not restrain that which has been enjoyed for twenty years past, but if that which has been so enjoyed is used in a different way, so as to do mischief, the Court may interpose; an injunction was ordered to restrain the defendant from using dammy wares, &c. so as to prevent the water flowing to the plaintiff's mill in such regular quantities, as it had ordinarily done.

1 Bro. 588.

Injunction may be granted against a lessee of a fish-pond, to restrain him from injuring it.

2 Bro. 64.

Tenants in common.

Injunction to stay waste refused where the plaintiff and defendant in possession are tenants in common.

3 Bro. 622.

A bill to this Court to restrain nuisances, extends to such only as are nuisances at law; and the fears of mankind, though reasonable ones, will not create a nuisance.

Nuisance.
3 Atk. 750.
Amb. 158.

In a plain case of waste or nuisance, upon a certificate and affidavit, and notice an injunction is granted before answer, but if it be a special case, upon a particular right the Court will not grant an injunction till *after* answer.

2 Vez. 453.

A general affidavit that plaintiffs were entitled to the fee-simple, is not sufficient to obtain an injunction to stay waste, a particular title must be stated.

1 Vez. 476.
1 Bro. 57.

If the right be on record, as a patent, or in case of a book vending, which by act of parliament is vested in a particular person, the Court will grant an injunction to prevent that right being infringed.

1 Vez. 476.
1 Bro. 451.

If the bill be to stay waste, a *subpœnâ* may issue before bill filed; but it ought to be filed before the return of the writ, and after defendant hath appeared, affidavit of waste may be filed, and upon notice of motion, an injunction will be granted if there be merits.

Stat. 4th & 5th Ann. c. 16.

Hind. 588.

Tenant for life having made a lease to defendant of coal-mines, amounting to a forfeiture, cannot join the remainder-man in a bill for an injunction to the defendant to stay working the mine.

3 Vez. jun. 3.

To yield up, quiet, or continue Possession of Land.

THIS writ is a judicial writ, and subsequent to a decree, being in the nature of a writ of execution, or *hab. fac. poss.*

Hind. 539.

Perpetual Injunction.

WHERE the case requires it, the Court will grant a perpetual injunction; as in the following instances, *viz.*

Against proving a will in the spiritual court; the same having been found, on a trial at law, to be no will. Ch. Ca. 80.

To stay actions at law of several persons, where the right had been tried and determined by one trial. 1 Vern. 266.

A determination by the Court for the performance of trusts, has been held a ground for a bill for a perpetual injunction against the party, setting up a legal estate to overturn the decree. 2 Vez. 90.

Perpetual injunction granted against suing upon a bond of fifty years standing. Ca. temp. Finch, 77.

Acceptance of a bill of exchange becoming void by the law of a foreign country; and the same having been vacated by a competent court there; a perpetual injunction was granted against proceedings here. Eq. Ca. Abr. 476. pl. 2. 524. pl. 7.

After several verdicts in ejectment, the Court will grant a perpetual injunction; so after two trials at bar, and the rather where it directs the issue. 1 P. W. 671. 2 Bro. P. C. 217.

For more on this head, see 2 *Eq. Ca. Abr.* 522. *Mitf.* 121—130. and *Fonblanq. Treat. of Equity*, 1 vol. 29. 30. 38. 2 vol. 12. 89.

INTERROGATORIES

ARE questions exhibited in writing, to be asked witnesses, parties, or contemnors, to be examined. What.

Interrogatories of Parties and Contemnors. Vide Contempt.

[THE defendant is sometimes ordered to be examined on interrogatories, to discover fraud and practice, or a contempt, or both.] Defendant examined.

In cases of contempt.

[If a party deny the contempt, he is commonly by order examined before a Master, on interrogatories settled by him, who shall certify if the contempt be proved or no.]

When copy of interrogatories given the party.

[Said, if the party be examined on a (bare) contempt, he shall have a copy of the interrogatories.]

Defendant examined.

[If it is for a fourth insufficient answer, or such like, the party shall not only answer, but shall also stand committed till he answer interrogatories, to be exhibited before an examiner, touching the point so insufficiently answered.]

[Pr. H. Ch. 10. 11.]

[A defendant, who, after four such answers, was to be examined, had, by order of Court, (for special reasons,) leave for one of her counsel to see the interrogatories (to advise her upon them in points of law) but not to have a copy.]

[1 Ch. Ca. 66.]

Interrogatories not allowed to be amended.

[A defendant ordered to be examined to an account, is examined short; the plaintiff prays that the interrogatories may be amended, which the Court denied.]

Account.

Account.

The way now is not to examine to a matter of account before hearing; but after, before a Master, if the witnesses be in town or near; if not, then by commission to be directed by the Master, upon his certificate; and either party may examine witnesses to an account, or to a particular thing, after hearing.

2 Har. 458.

[A defendant having answered the first interrogatories imperfectly, was ordered to be examined on new ones; which being exhibited, he answered only the former; upon motion, the Court ordered him to pay costs, to be taxed by a Master; as not having obeyed the order of Court, but given the plaintiff a needless expence.]

[In case of a prosecution of a contempt for breach of an order of Court, or otherwise grounded upon an affidavit, the interrogatories shall not be extended to any other matter than what is contained in the said affidavit or order. And if any other be exhibited, the party to be examined may for that reason demur to them, or refuse to answer them.]

[Or. Ch. 114.]

[A person in contempt appeared on an attachment, and offered to be examined on interrogatories; the Court ordered them to be hastened and filed in four days, (though the common time allowed is eight,) or the party to be discharged.]

[After a party is brought in upon a contempt, and

is ordered to be examined on interrogatories; if he refuses, he will be committed.]

[So it is, if he enters his appearance with the register upon a process of contempt, and is ordered to be examined; and departs without being examined, and without licence.] [Or. Ch. 124.] Cur. Can. 94.

The plaintiff being a very weak man, and to be examined upon interrogatories, the Master was ordered to take his examination, that no advantage should be taken of his weakness. Master to settle. 3 P. W. 289.

After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses to falsify the defendant's examination. To falsify examination. 3 P. W. 413.

An order having been obtained for the examination of certain persons, before the Master, *pro interesse suo*, liberty was moved for to exhibit interrogatories before the Master, to falsify their examination; and ordered, as of course, without notice. 2 Bro. 24.

Interrogatories of Witnesses

[ARE exhibited by the party, or directed by the Court, to be proposed, and asked the witnesses, examined in the cause, touching the merits thereof, or some incident therein.] How exhibited.

[They are either direct on the part of him that produces the witnesses; or counter interrogatories on the behalf of the adverse party.] How directed.

[Ordinarily, both plaintiff and defendant may exhibit direct and counter interrogatories.]

[They must be drawn, or perused and signed by counsel; else they are to stand suppressed.] Signed. [Or. Ch. 173]

[They must be exhibited before any witness be examined on either side.]

[They must be engrossed on parchment.] Engrossed.

[If the witnesses be examined before an Examiner of the Court, the interrogatories must be produced before, and left with him: if, in the country, on a commission, the interrogatories must be either annexed to the commission at the issuing thereof, or by consent of parties (which now seems to be generally intended); they may be exhibited before the Commissioners, on opening the commission.] [1 Pr. Alm. 26. 3 Pr. Alm. 6.] Har. 461.

[Said, if the Commission were *ex parte*, heretofore, the interrogatories were always included in the commission.] [Pr. H. Ch. 15.]

How drawn.

[Interrogatories must be short, pertinent, and to the points necessary,] or they will be suppressed. [They must not be leading; if they be, the depositions are to stand suppressed.] 1 Ves. J. 406. [Or. Ch. 173.]

[These are accounted leading words: Did you not do, or see such, or such a thing? &c. And so are all such as are too particular, or seem to point more to one side of the question than the other.]

When leading suppressed.

Defendant's fourth interrogatory, being leading, was, together with the deposition, suppressed; and leave was given to exhibit new interrogatories, for the examination of the same witnesses, to be settled by the Master.—The Court will not always allow such indulgences, where the depositions are suppressed. Amb. 585.

New interrogatories.

[When witnesses are examined, in court, upon a schedule of interrogatories, there shall be no new interrogatories put in to examine the same witnesses: but new interrogatories may be exhibited in court for examining new witnesses, at any time before publication, though there has been a joint commission executed in the country: and the Court will, on motion, give leave, on a supplemental bill, to add to the first interrogatories, so as the new interrogatories contain nothing but what relates to the supplement.] [Or. Ch. 103.]

[If either party have a commission *de novo*, after he hath examined on a former, he must examine on the same interrogatories, as were exhibited by him on the former commission, and no other, without order or consent of parties.]—And the Court very seldom allows new interrogatories to be exhibited, as it is attended with inconveniences; and, it is presumed, that there has been a discovery made of the proofs, when the party is desirous to examine upon a new set of interrogatories. Prec. Ch. 493. Amb. 585. Gilb. Rep. 150. 1 Har. 461.

But before the examiner, the party may examine upon a new set of interrogatories, because that is presumed to be the examination of the Judge, and the Judge may examine upon interrogatories *ex re nata*, out of the articles; besides the Examiner is at the peril of his office, to make no discovery of the proofs. Gilb. Ch. 127. Prec. Ch. 386. 1 Eq. Ca. Ab. 233.

[If leave be given to examine a witness after publication, and before hearing, a Master is commonly ordered,

ordered to settle the interrogatories, that they may be to such points only as were omitted before, and as are now ordered to be examined to. Interrogatories for proving particular points needful upon a reference to a Master, shall be directed by the Master, and shall be to such points only.]—*Vide Reference.* Master to settle.

The plaintiff's Christian name being mistaken in the title of the interrogatories, the depositions could not be read, nor would the Court permit the title to be amended, though most of the witnesses since their examination were gone to sea. Suppressed. 2 Vern. 435.

A witness has been directed to be examined on interrogatories, and the Court has, in some cases, ordered a witness to attend personally, where there have been doubts. Witness to attend. 2 Ves. 100.

The examination of witnesses, being foreigners, must be in *English*, and the interrogatories must, for that purpose, be translated into the language of the deponents, and their answer translated by sworn interpreters. Foreigners, witnesses. 1 Atk. 21. 4 Bro. 90.

INTEREST.

VIDE

Legacy.

[SAID, no interest shall be paid for a legacy till demand, whatever it be charged upon, except a time of payment be appointed by the Will.]—*Vide Pree. Ch.* 161. When interest paid upon a legacy.

[Said, Spiritual Court will allow a year for the payment of a legacy.] What time allowed for paying legacies.

If a legacy be charged upon land, which yields profits, and there is no time for payment mentioned in the will, it shall carry interest from the testator's death. From what time allowed upon legacy. 2 P. W. 26.

If a legacy out of personal estate, *and no time of payment mentioned* in the will, it carries interest only from the end of the year, after the death of the testator. 2 P. W. 26. 2 Atk. 108. 1 Ves. 308. Bunb. 240.

If a legacy be charged upon a dry reversion, it shall carry interest only from a year after the death of the testator. 3 P. W. 253. 2 P. W. 27.

If a legacy be given out of personal estate, consisting of mortgages carrying interest, or of stocks yielding profit half-yearly, it shall carry interest from the death of the testator.

If the legacy be brought into court, and the legatee has notice of it, so that it is his fault not to pray to have the money, or that the money should be put out, the legatee, in such case, shall lose the interest from the time the legacy was brought into court; but if the money was put out, he shall have the interest which the money so put out yielded.

2 P. W. 27.

If a man devise lands, for the payment of debts, his simple contract debts shall carry interest, as the land, which is the fund, yields annual profits. *Sed contra*, 2 *Vez.* 363—587 1 *Bro.* 41. and 1 *P. W.* 228.

2 P. W. 27.

Interest given in equity upon a simple contract debt, as at law, it is done, either by contract or in damages, for every debt detained.

1 Vez. J. 63.

Interest upon interest.

Upon a mortgage, it has been determined that the mortgagee shall have interest upon interest. *Contra*, 1 *Vern.* 169. 2 *Vern.* 392. 1 *Vez. jun.* 99.

1 Ch. Ca. 258.
2 Ch. Ca. 150.
1 P. W. 453.
480. 653.
1 Bro. 574.
2 Vez. J. 159.

After decree to foreclose and the report of the sum due for principal and interest confirmed, the interest becomes principal.

On bonds or legacies, the interest, subsequent to the report, is only to be computed upon the principal.

Where the debt is not before liquidated, interest is only given from the time of the Master's report confirmed.—4 *Bro.* 157. from the date of the report.

1 P. W. 377.
4 Bro. 157.
2 Atk. 108.

But where the debt is liquidated before, this Court often gives interest from the time of liquidation.

2 Atk. 212.

Further directions

Reservation of further directions generally has not been considered to reserve interest, except after a trial at law.

2 Vez. 470.

And yet there is a discretionary power in this Court to allow interest upon special circumstances, though not reserved; as where the demand in its nature carries interest, as a bond, &c. or where it appears that interest has been made of the money, pending the suit.

2 Atk. 440.

It is *now* however held, that under a general reservation of further directions the Court can give interest.

Amb. 584.
2 Vez. J. 164.

Strangers.

In the case of *strangers*, whether the legacy be given absolutely, and payable at twenty-one, or not given until twenty-one, they can have no interest in the mean time; otherwise in the case of *children*.

3 Atk. 438.

Though

Though by deed five per cent. was to be allowed, yet the adminiſtrator having made only four per cent. of it, the Court reduced the intereſt to that rate: *Rate of intereſt.* 3 P. W. 227.

It is the rule of this Court, to allow no more than four per cent. where the will does not mention intereſt on portions charged upon land, and has alſo been extended to caſes of legacies and portions charged upon perſonal eſtate. 2 Atk. 343. 523.

Five per cent. directed upon legacies, charged upon leaſehold, and other perſonal eſtate. But if charged upon the real eſtate four per cent. only. 3 Atk. 402. 579. 1 Ves 171. 277. 2 Ves 239. 2 Ves. J. 511.

Where an executor keeps money of his teſtator in his hands for a long time, without accounting, and employs it in trade, he ſhall pay intereſt. 1 Bro. 359.

A truſtee in a will which directed money to be lent at the beſt intereſt, by conſent of his co-truſtee, keeps it at four per *cent.* ordered to pay five. 2 Bro. 430.

An agent of an adminiſtrator keeping money in his hands, which he had propoſed to his principal to lay out in the funds, ordered to pay intereſt. 3 Bro. 107. 1 Ves. J. 452.

In a caſe where ſimple intereſt would not have been a ſatisfaction, under particular circumſtances, compound intereſt was allowed. 1 Bro. 440.

Intereſt on an old bond cannot be computed beyond the penalty. 3 Bro. 496. 3 Ves. J 557.

No intereſt is allowed upon a judgment in an account before the Maſter. 2 Ver. J. 719.

IRELAND.

[HELD upon demurrer, that witneſſes might be examined here upon a bill in perpetual memory to be ſent cloſe over into *Ireland*, and there be uſed as the Judges of that Court, who ſhould have conuſance of the matter in *Ireland*, ſhould appoint.] [Pr.H.Ch.106]

[Said, if the matter had originally begun in *Ireland*, witneſſes in that cauſe might have been examined in *England*, by Commiſſioners under the Great Seal of *Ireland*.] [Ibid.]

Court of Equity, in *England*, will relieve againſt fraudulent conveyances gained of lands in *Ireland*, when the defendant is here. 1 Vern. 75.

A bill lies here to be relieved, touching a truſt of lands in *Ireland*, the defendant being in *England*.

1 Vern. 405.

Bill for a partition of lands in *Ireland* diſmiſſed; but an account of profits decreed.

1 Vern. 421.

A Court of Chancery in *England* may grant a ſequeſtration againſt the defendant in *Ireland*, but it muſt be after ſequeſtration taken out here and *nulla bona* returned.—*Sed quære* to whom the ſequeſtration againſt the defendant's eſtate in *Ireland* is to be directed, and if it ſhould not be by an order from the *Lord Chancellor* reciting the proceedings here, and directing the Chancellor of *Ireland* to iſſue out a ſequeſtration there for the benefit of the plaintiff, and towards ſatisfaction of his demands?

2 P. W. 261.

A bond executed in *England* for a debt in *Ireland* ſhall carry only *Engliſh* intereſt; but where the debt was contracted in *England*, and the bond taken for it in *Ireland*, it ſhall carry *Iriſh* intereſt.

2 Vern. 395.

2 Atk. 382.

It has been determined if an action be brought in *Ireland* on a bond, and ſued to judgment there, you cannot even plead that judgment to an action in the courts here. The general rule of Courts of Equity with regard to pleas, is the ſame as in Courts of Law, but exerciſed with a more liberal diſcretion.

3 Atk. 589.

ISSUE AT LAW.

VIDE

Proof and Evidence.

In what caſes.

[IF upon hearing, the proofs and facts are ſo doubtful, that the Court cannot well tell which way to determine the matter, eſpecially where the queſtion is touching a title of inheritance or freehold; the Court commonly orders and directs an iſſue at law to be tried by jury, for the better informing and guiding the conſcience of the Court.]

[Where, upon hearing a matter not in iſſue does appear to the Court, which goes to the very right; the Court will ſometimes order an iſſue at law to try it, and decree thereupon.]

[2 Ch. Ca. 40, 41.]

[Such

[Such issue consists sometimes of one point, sometimes of more; as whether such a will, deed, &c. was made by such an one; and whether the party was *compos mentis* at the time of making thereof; and whether there was any, and what consideration *bona fide* paid, &c. or as the case requires.]

[Such issue is tried in an action on the case, upon a feigned issue concerning the point to be tried.] How tried.

[It is commonly ordered to be in the Queen's Bench or Common Pleas, and to be tried before the Lord Chief Justice, at a sitting in *Middlesex* or *London*. Sometimes it is ordered to be tried at the assizes in the country.]

[After a trial, the Judge before whom it was tried, certifies the Court how it is found; that this Court may proceed to decree.] Judge certifies.

[Where lands are in question, the Court sometimes orders the jury to have a view. Where they are to have the view of a particular part of a manor; the Court will order them sometimes to take a view of the whole, and ascertain the bounds of it.] View.

[If the question be touching an inheritance or freehold, the Court (if prayed) generally grants a second trial before it concludes a man in his title; and if it happens, that one verdict goes one way, and the other another way; then the Court will ordinarily, on motion, order a third trial, which is commonly conclusive. But,] New trial.

[Where there was verdict against verdict, and a third trial was prayed by him for whom the first went; and it appeared now to the Court by affidavit, that since the last trial he had caused a bank of earth to be dug away, and with it old posts which were fixed in the ground, and supposed to have been the bottom of park pales, and dividing the land in question, and which the jury could not now have any view of; the Court for this cause denied another trial.] New trial.

[Said, to induce this Court to set aside a former trial of an issue directed, for some irregularity in the trial, and for that cause to grant a new one; there must ordinarily be certificate in writing from the Judge or Court before whom it was tried, of a verdict against evidence, or other misbehaviour of the jury, or such like.] New trial.

Judge's certificate.

[*Note.* A judge does not certify any thing in writing to a Court at Law touching a trial.]

How drawn up.

[If an issue be directed, and the party that should by order draw it, will not; this Court upon the matters being put into a suggestion in writing, and moved, will, upon proof of the refusal, take the matter directed to be put in issue, *pro confesso*: if he draws it up, but not according to the order; the Court will order it to be settled and amended, if need be.]

[If the issue be so drawn, that the matters the Court intended should be tried are not put in issue, nor are found by the jury; the Court, if it appears not to have been other than bare mistake, will order a new trial.]

Trial set aside.

[An issue being directed, the plaintiff gets an order *ex parte*, to strike out the name of a plaintiff and make use of him as a witness, and had a verdict; the Court set aside the trial for this surprise of the defendant.]

[2 Ch. Ca. 80.]

Costs.

If an issue be directed out of Chancery, and the party plaintiff in the issue gives notice of trial, and does not countermand in time; upon motion, the Court of Chancery will give costs. So on an issue out of Chancery, after such issue made up, it is proper to move the Chancery for a special jury, if the case requires it.

Special jury.

2 P. W. 68.

Court's discretion.

The granting the relief prayed, by directing an issue, is discretionary in the Court. The general ground of this sort of bill is to remove terms, or other impediments, out of the way; and it is discretionary in those cases, either to direct an issue, or prevent the terms being set up, so as to give an opportunity for the plaintiff to bring an action.

Amb. 428.

New trial.

After a verdict on an issue directed, a motion for a new trial, on account of having further evidence to produce, was refused, there being no fraud or surprise stated.

3 Ves. jun. 135.

Answer.

On an issue from this Court, the Lord Chancellor refused to send down the original answer, till after refusal of the office-copy as evidence.

3 Ves. jun. 152.

JURISDICTION.

[THE jurisdiction of this Court extends to all subjects touching lands or other matters in *England*, save such as live within counties palatine, and other like franchises, and such lands as lie there, and matters local done or arising there; in which cases the county palatine, or other franchises, have ordinarily the sole jurisdiction.] How extensive. [1 Ch. Ca. 41.]

[Yet this Court hath a sovereign power above all other courts of equity; so that if there be a failure of jurisdiction or justice in them, or error happens in their judgment, the parties may be redressed here.] [Pr. H. Ch. 35, 36.]

[Seeing this Court cannot hold plea of land, so as to bind the right thereof, but only the person, it often, where the party is in *England*, holds plea as well touching lands, as other matters done in *Ireland*, or in the plantations or other dominions of *England*, where the things sought, or to be performed, are only personal; for though it cannot come at the possession or profits of lands out of the realm, by a sheriff or commissioner; yet it will regulate the party's conscience in such personal matters and acts as he may do; and will imprison him if he does them not.] 1 Vern. 75. 2 Vern. 494. 2 P. W. 262. Amb. 236.

[By the general custom and ancient usage of this Court, all bills are retainable here, where the equity of the cause beareth and requires it, and the common law doth afford us no relief, but rather pressure and rigour.] [Toth. 81.]

[Whilst a suit was depending here, the Court would not suffer the defendant to prosecute at law, touching the same matter, upon a coincident or collateral security; but ordered the other party to give judgment and a release of errors, and to be discharged out of custody: and this, where the party was in custody upon a process at law, upon a bond for payment of four thousand pounds, which sum was agreed and intended to be secured by mortgage; and the defendant in this court (who was plaintiff at law) had by answer, swore there were latent incumbrances, and that the mortgage was not sufficient. For the Court said, this must be taken as a bond to perform covenants; and added, that though in such case a party be in execution, To stay suits at law.

execution, yet if it appears the other security is sufficient, he may be discharged out of execution, giving a new judgment, and a release of errors.]

County palatine.

[It hath been held, if the plaintiff charge the defendant for issues and profits of lands in the county palatine of *Lancaster*, merely by way of account, the defendant should not be compelled to answer here: otherwise, if he charge the defendant in respect of a promise.]

[Cary Rep. 162.]

University.

[Conusance of pleas in equity in the university of *Oxford* was not allowed by way of claim. Said, it must be by way of plea; but need not be upon oath.]

[1 Ch. Ca. 237, 258.]

2 Vern. 212.

Under 40s. value.

[If the bill be touching titles of land not more than six acres, and not of the yearly value of forty shillings; upon shewing this to the Court by affidavit, the cause will ordinarily be dismissed.]

[Toth. 30.]

[Yet said, if it be for a rent-service, though ever so small, the Court will hold plea of it; because the land (which is of the greater value) may escheat.]

[Pr. H. Ch. 50.]

To value.

[So all suits for matters under the value of ten pounds are, for such cause, to be dismissed with costs to be paid the defendant.]

[Toth. 30.]

[Where a suit was for the benefit of the poor, it was returned here, though under forty shillings *per annum*,]

[Cary Rep. 147.]

Concurrent jurisdiction.

[Where this Court hath an equal concurrent jurisdiction with another; if the suit be first commenced here, this Court will grant an injunction to the parties as to any suit in the other Court touching the same matter: because this Court has gained the priority of jurisdiction, by being first possessed of the cause.]

Prec. Ch. 547.

[As where one brings a bill here, alledging some good discharge of tythes; this Court will not suffer the party to proceed on a cross-bill in the Exchequer touching the same matter.]

University.

[A bill was exhibited here touching certain promises about goods and money. Upon the defendant's producing a certificate under the seal of the University of their right of conusance of all pleas, *&c.* (felony, maihem and frank-tenement excepted) within or without the city of *Oxford*, &c. where one of the parties is a master or scholar, or common minister of the same university, or such as the Chancellor, *&c.* will certify, ought to enjoy the privilege of the university, *&c.* and that the defendant is a bachelor of law there; the bill was dismissed.]

[Pr. H. Ch. 168. Cary Rep. 92.]

[Even a cook of a college there has had his privilege allowed here.] [Pr.H.Ch. 168. Cary Rep. 92.]

[Where a member of the university of *Oxford* was joined a defendant with one not subject to that jurisdiction, the university-man was put to answer here.] [Ca. Rep. 79.]

[A bill for lands lying in the county palatine of *Chester* was dismissed, because the matter was cognizable only within the county palatine, and might be determined before the Chamberlain there.] County palatine. [Ca. Rep. 85.]

[A bill here being to be relieved of certain debts in the county palatine of *Chester*, where the defendant also dwelt, was therefore dismissed.]

[A bill here was to be relieved for copyhold lands; and though the defendant insisted, that the lands were ancient demesne of the Queen's manor of *Woodstock*, and there only impleadable; yet he was driven to answer.] Manor of *Woodstock*. [Ca. Rep. 121, 122.]

[Where the bill was for lands, some of which were parcel of the Duchy of *Lancaster*, it was dismissed as to those.] County palatine. [Ca. Rep. 139.]

[Said, this Court will not ordinarily retain a suit for lands in the county palatine of *Chester*.] [Toth. 117.]

[A privileged person of this Court exhibited his bill here for lands lying in the county palatine of *Chester*. Upon shewing letters patent under the Great Seal, that this Court should not hold plea of lands there, the bill was dismissed, *nisi causâ*.] [Ca. Rep. 155.]

[Yet a defendant pleading the jurisdiction of the county palatine of *Chester* to a suit here was over-ruled to answer, the plaintiff living out of the county.] [3 Px. Alm. 23.]

[A decree being afterwards made at *Chester* between the same parties, was reversed here; for that it was made *coram non judice*.] [Ibidem.]

[In some cases the privilege claimed in the *Cinque Ports* hath been allowed; in some over-ruled.] [Toth. 151.]

[Conusance of pleas or privilege claimed by *Feversham* in *Kent* hath been over-ruled.] [Toth. 117.]

[This Court hath stayed the proceedings in the Stannaries. In some cases the privilege of the Court of Stannaries hath been allowed.] [Ibidem.]

[An injunction was granted to stay the proceedings in the Chancery at *Durham*, in case the suit there interfered with the suit here.] [3 Px. Alm. 23.]

[The plaintiff's witnesses living out of the jurisdiction of *Cambridge*, the defendant was over-ruled in the privilege,

privilege, which he insisted on of being impleaded there only, and put to answer; but after witnesses were examined, the cause was dismissed this court.]

[Pr.H.Ch.156.]

[The mayor and commonalty of *Canterbury*, defendants, refused to answer, for that by the charter of that city they ought not to be impleaded out of the same city; but it not being thought reasonable that they should be judges of their cause, they were ordered to answer.]

[Pr.H.Ch.160.]

[Said, the jurisdiction of this Court ought not to be impeached or denied by any other Court, in matters wherein the Queen is concerned.]

[3 Px.Alm.35.]

[To a bill for distribution of an intestate's estate, the defendant pleaded the statute whereby the ordinary is empowered to take security, is made judge, *&c.*: the plea was over-ruled, and the defendant put to answer.]

[2 Ch. Ca. 95.]

1 Vern. 54. Admiral jurisdiction.

The Court of Chancery has an admiral jurisdiction.

Plea.

Defendant pleaded an act of Parliament, which had given an exclusive jurisdiction to the Courts of *A.* The plea was over-ruled because it did not aver that there was a Court of Equity there.

1 Vern. 58. Petty-bag.

The jurisdiction of the Court of Chancery, even in the Petty-Bag, is not subjected to, nor to be controlled by the King's Bench.

1 Vern. 131.

1 Vern. 292. 2 P. W. 156.

The Court of Chancery has a natural jurisdiction in cases of forgery, as well as frauds.

Plea.

If a party insists that the Court of Chancery has not jurisdiction of the matters in question, he must plead to the jurisdiction of the Court. He is too late to object at the hearing. *Sed vide* 1 *Ves.* 446.

2 Vern. 484.

Lunaticks.

In this Court there were several things which belonged to the *King* as *pater patriæ*, and fell under the care and direction of this Court, as charities, infants, idiots and lunaticks, *&c.*; afterwards, such of them as were of profit to the King were removed to the *Court of Wards* by the statute; but upon the dissolution of that Court, came back again to the Court of Chancery. The Lord Chancellor has jurisdiction in cases of idiotcy or lunacy, not as Lord Chancellor, but by virtue of a royal sign-manual; and from his orders or decrees touching these matters, no appeal lies to the House of Lords, but only to the King in council.

2 Vern. 34[illegible]. 2 P. W. 118.

3 P. W. 107.

If

If one be sued in an inferior court for a matter out of the jurisdiction. In vacation he may move the Court of Chancery for a prohibition; and if a prohibition has been granted *improvidè*, the Court will grant a *supersedeas*, as where a prohibition had been granted to the courts of *London*, after the defendant had imparled. *Prohibition.* 1 P. W. 477.

In a plea to the jurisdiction of a general court, it must be shewn in the affirmative, what other court has jurisdiction, as well as negatively, that it is not there. But if it is an inferior court, it is only necessary to plead thereto, without shewing where the jurisdiction is. *Plea.* 1 Ves. 203. 2 Ves. 357.

Devise of 3500*l.* *South-Sea* annuities, to the plaintiffs, to be applied to the maintenance of poor labourers residing in *Edinburgh*. Lord Chancellor would not give directions as to the distribution of money, which belonged to another jurisdiction, that is, to some of the courts in *Scotland*; but directed the annuities to be paid to such persons as the plaintiffs should appoint, to be applied to the trusts of the will. *Scotland.* Amb. 236.

The Court of Chancery has not jurisdiction over the discipline, or the property of chambers in an inn of court. 2 P. W. 511. 2 Bro. 241.

If the case be doubtful, or the remedy at law difficult, this Court has jurisdiction. 1 Ves. jun. 417.

Political treaties between a foreign state, and subjects of the crown of *Great Britain*, acting as an independent state under powers granted by charter and acts of Parliament, are not a subject of municipal jurisdiction: and a bill founded on such treaties by the Nabob of *Arcot* against the *East India* Company, was dismissed. 4 Bro. 180. 2 Ves. J. 56. S. C. 3 Ves. jun. 424.

Confiscation by a foreign state cannot operate upon property in this country, it is the subject of political, not of municipal discussion. 4 Ves. jun. 424.

The Court of Chancery will not examine the *quantum* of the King's debt, nor how far extents sued out are necessary, such matters being cognizable in the Court of Exchequer, which is the King's Court of Revenue. 2 Vern. 426.

LEGACY.

VIDE

Intereſt.

Intereſt.

[SAID, no intereſt ſhall be paid for a legacy till demand, whatever it be charged upon; except a time of payment be appointed by the will.] *Vide Prec. Ch.* 161.

When paid.

[Said, the Spiritual Court allows a year for the payment of a legacy.]

Notice.

A legatee who has no notice of his legacy, till the executor publiſhes it in the Gazette, ſhall have no intereſt.

Prec. Ch. 11.

Security.

The Court will of courſe order ſecurity to be given for a legacy payable at a future day.

Amb. 273.

LIMITATIONS OF SUITS.

VIDE

Statute.

[WHERE plate was depoſited with one ſo long ago, that the ſtatute of limitations might have been pleaded at law in *detinue* or *trover*; ſaid, a bill might be brought here for the breach of truſt.]

Legacy.
1 Vern. 256.
2 Atk. 71.
4 Bro. 115.

A legacy is not within the ſtatute of limitations, and length of time is only a preſumption of payment.

2 Ves. jun. 11. 2 Ves. jun. 280.

Where equity will not ſuffer the ſtatute to be pleaded at law.
1 Vern. 73.
1 Atk. 282.
2 Atk. 1.

If a man ſues in Chancery, and pending the ſuit the ſtatute of limitations attaches on his demand, and his bill is afterwards diſmiſſed, as being a matter determinable at law, the Court will not ſuffer the ſtatute to be pleaded in bar to his demand at law. *Sed vide* 1 *Atk.* 282. 2 *Atk.* 1.

Account.
1 Vern. 456.
2 Ves. 400.

The ſtatute of limitations is no plea in bar to an open account.

Charity.
2 Vern. 399.

A charity is not barred by length of time, or the ſtatute of limitations.

On

On a bill in equity being abated by death, the executor is barred by the ſtatute of limitations, if he does not revive within ſix years, but not *after a decree* to account. *Abatement.* 1 P. W. 742.

A feme covert having a ſeparate eſtate, borrows money and gives a bond. A ſeparate eſtate is liable, and though ſix years paſs, the demand is not barred by the ſtatute, for the ſeparate eſtate was a truſt eſtate, and a truſt is not within the ſtatute of limitations. But the rule that a truſt is not within the ſtatute of limitations, applies only between truſtee and *ceſtui que truſt*, not againſt a truſt by implication as affected by an equity. *Truſt.* 2 P. W. 144. Barnard. 449. 1 Bro. 554.

The ſtatute of limitations no plea againſt fraud; but then it ſhould be charged by the bill, that the fraud was diſcovered within ſix years before the bill filed. *Fraud.* 3 P. W. 143. 3 Atk. 558. 3 Bro. 633.

The ſame length of time ſhall bar a redemption in equity, as bars an entry at law or ejectment, which time is twenty years in the firſt clauſe of the ſtatute of limitations, where there is no diſability; ſo *after the diſability removed* the time fixed for proſecuting, in the proviſo, (which is ten years) ought to be obſerved in this court. *Ejectment.* 1 P. W. 270. 3 P. W. 287.

If an executor, adminiſtrator, or truſtee for an infant, neglects to ſue within ſix years, the ſtatute of limitation ſhall bind the infant. So is the infant barred, if he neglects to ſue within ſix years after he comes of age. *Infant.* 3 P. W. 309. Pres. Ch. 518.

A corporation ſhall have the benefit of the ſtatute of limitations as well as a private perſon. *Corporation.* 3 P. W. 310.

A bill lies by the aſſignee of a bankrupt for goods pledged by the bankrupt, notwithſtanding the ſtatute of limitations; *as no time was ſtated for the redemption.* *Bankrupt.* 1 Ves. 278.

But notwithſtanding an aſſignee under a commiſſion of bankruptcy, claims under the acts concerning bankrupts and alſo by virtue of the aſſignment, which is under the Great Seal; yet, as he ſtands only in the place of the bankrupt, againſt whom the ſtatute of limitations is pleadable, ſo is he the aſſignee liable to be barred thereby. 3 P. W. 143.

The ſtatute of limitations will run upon an annuity. *Annuity.* 2 Atk. 71.

Length of time creates a ſtrong preſumption of payment; as where portions became due in 1673, and were not ſued for till 1717. *Length of time.* 2 Atk. 178.

So,

So, where an executor of a steward to Lord *Bradford*, after an acquiescence of 17 years, sets up a demand for a large sum due for business done by his testator: statute of limitations was pleaded and satisfaction presumed from the length of time.

3 Atk. 105. 4 Bro. 115. Amb. 231.

So payment of a legacy presumed after forty years without demand.

2 Ves. jun. 11. 280.

Original.

Though an original be filed at law, yet if there has been no proceeding upon it for six years, it will not prevent the statute of limitations from running upon the demand.

Atk. 395.

Joint-tenant.

It has been said, that the statute of limitations will not run against one joint-tenant, or tenant in common, unless an actual ouster is made; there ought to be some ouster; but, if after such ouster, a tenant in common or joint-tenant continues in the possession of the whole for twenty years, it is a bar.

2 Atk. 632.

Receiver.

Though a Receiver is appointed by this Court, yet that will not alter the possession of the estate, in the person who shall be found entitled at the time the Receiver was appointed, so as to prevent the statute of limitations running on during the right in dispute.

2 Atk. 15.

Redemption.

The rule relative to redemptions, established here by way of analogy to the statute of limitations, is, that after twenty years possession, a mortgagee shall not be disturbed, but no time can bar a fraud.

3 Atk. 313. 2 Ves. J. 280. 2 Ves. J. 583.

Debts revived

As to the question, Whether debts barred by the statute can be revived by a devise of land in trust, to pay debts generally, see the cases cited in the margin.

1 Salk. 154. 2 Vern. 141. 2 P. W. 374. 3 P. W. 90. Pre. Ch. 385. 3 Atk. 107.

LUNATICKS.

Committees.

[LUNATICKS must generally sue and answer by their committees.]

D. murrer. Parties. [1 Ch. Ca. 153.]

[If the lunatick be not named a party in the bill or information by the attorney, it is commonly good cause of demurrer.]

[But if the bill, in nature of an information, is to be relieved against some act done during his lunacy, he must not be named a party; for that were to stultify himself.]

[1 Ch. Ca. 183.]

[A bill

[A bill was brought by a lunatick: the defendant denies the lunacy at the time of the agreement, and offers to pay two hundred pounds, purſuant to and in confirmation of the agreement. The Court being moved for direction in it, the plaintiffs would have had that the receipt might be general, or in purſuance of the order. The Court ſaid, they might give ſuch receipts as the defendant deſired; it could not harm the lunatick, being only the committee's act; nor ſhould it prejudice them on the hearing.]

Motion that a man, who was found a lunatick, being recovered, might be inſpected, and might make a ſettlement of his eſtate, refuſed; but directed, if he made any ſettlement, that it might be done before the Juſtice of the Common Pleas, by fine. Fine. 1 Vern. 155.

Committee of a lunatick cannot make leaſes, nor incumber the lunatick's eſtate without leave of the Court. And it was referred to the Maſter, to ſee what allowance was fit for the lunatick's ſon. Committee power. 1 Vern. 262.

Where the huſband was a lunatick, the wife, though an *Iriſh* peereſs, was committed for not producing him before the commiſſioners. Produced to the commiſſioners. 1 P. W. 702.

Said by the Lord Chancellor, that the maxim that the next of kin to whom the land cannot deſcend is to be guardian in ſoccage, is not founded in reaſon; and the cuſtody of the lunatick was committed to the next remainder-man in tail of the principal part of the eſtate. Who ſhall be committee. 2 P. W. 263.

A lunatick is never to be conſidered as irrecoverable; and his comfort is to be conſidered in the allowance which is to be made him, and not his next of kin. Maintenance. 2 P. W. 265. 1 Ves. jun. 297. 2 Ves. jun. 72.

No objection that the committee of the lunatick's perſon is the next of kin to the lunatick, and will come in for a ſhare of his perſonal eſtate by the ſtatute of diſtributions. Committee. 2 P.W. 544. 638.

Deviſe by father of the cuſtody of a lunatick ſon, *who is above twenty-one years of age*, void. Deviſe void. 2 P. W. 638.

The Chancellor allowed the profits of the lunatick's eſtate to the committee, for the maintenance of his perſon. The lunatick dies, his adminiſtrator files a bill for an account of theſe profits; the defendant, the committee, pleads the order of Court of the allowance for maintenance; the Plea ordered to ſtand for an anſwer; but the Court declared they would not relieve in ſuch caſe, without groſs fraud. Maintenance. 3 P. W. 104.

The King's grant of a lunatick's eſtate without account is void; but the Chancellor may give ſuch yearly maintenance as amounts to the whole profits of the lunatick's eſtate.

3 P. W. 111.

Truſtees.

By ſtat. 4 *G.* 2. *cap.* 10. ideots, lunaticks, *&c.* or their committees, by the direction of the Lord Chancellor, may aſſign over their truſts or mortgages, and be ordered to make ſuch conveyances, in like manner as truſtees or mortgagees of ſane memory.

4 G. 2. c. 10.

No allowance to committee.

The Court will not allow the committee of a lunatick any thing for his trouble: But under particular circumſtances the Court increaſed the allowance for maintenance, in order to anſwer the trouble.

Amb. 78.

Property not to be altered.

In caſes of lunacy, the firſt care of the Court is the maintenance of the lunatick; and after that, it is a rule never departed from, not to vary or change the property of the lunatick, ſo as to alter the ſucceſſion to it.

Amb. 82.

Chancellor's power.

The Lord Chancellor, by order, ſtopped a lunatick from being taken to Scotland, before commiſſion taken out.

Amb. 82.

Lien on the eſtate.

The committee has a lien on the lunatick's eſtate; and the ſolicitor, who had been employed to proſecute ſuits for the lunatick, was ordered to ſtand in his place. *Sed quære.*

Amb. 103.

Receiver.

On petition by the brother to be committee of the perſon, and that a receiver may be appointed of the eſtate, the heir at law, who, with the brother, was the only next of kin, declining to be committee of the eſtate from his circumſtances, and not being able to give the ſecurity required, the petitioner was appointed committee of the perſonal eſtate, with a reſtriction not to receive the rents; and a receiver was appointed.

Amb. 104.

Commiſſion.

Commiſſion of lunacy ordered againſt a perſon who was at *St. Venant* in *France*, to be executed in Eſſex, where his manſion was.

Amb. 109.
2 Vez. 401.

Chancellor's power.

Lord Chancellor may make an order in a lunatick's affairs, after the death of the lunatick.

Amb. 705.

Vagrants.

The Act of Parliament which empowers Juſtices of the Peace to take care of lunaticks, upon complaint made of any outrages committed, relates to vagrant lunaticks only.

2 Atk. 52.

Contempt.

It is a contempt of the Court to keep back a commiſſion of lunacy for years, without putting it in execution, and the commiſſion was diſcharged with coſts.

2 Atk. 52.

An

An inquisition of lunacy is always admitted to be read, but is not conclusive evidence, for it may be traversed. Evidence. 2 Atk. 412.

Where, before an inquisition of lunacy, a person who was found a lunatick had made a purchase, with the approbation of his only son, the Court will not, after the inquisition, change the disposition of the purchase-money, but the purchase shall stand. And the Court have allowed part of a lunatick's personal estate to be laid out in repairs and improvements of his real estate. Property not to be altered. 2 Atk. 412. 414.

After the Court of Wards was taken away, the jurisdiction over lunaticks and ideots reverted back to the Court of Chancery, to which it originally belonged. —As to the power of the Crown and the Chancellor in cases of ideots and lunaticks, *vide cases in the margin.* Jurisdiction. 2 Atk. 554. 3 Atk. 635. 2 Ves. jun. 75.

Where there is any misbehaviour in the execution of an inquisition of lunacy, it may be examined into and quashed, and a new commission issued. And the person against whom the commission issued, was allowed to traverse it. And the grant of the custody was suspended till further order.—Not only the lunatick, but the heir of the lunatick, is bound upon the traverse of the inquisition.—And where the alienee of the lunatick and the lunatick traverse, if he be found a lunatick at the time of the alienation, they are both bound. Commission quashed. 3 Atk. 6, 7. Traverse. 3 Atk. 308. 3 Atk. 312.

Where the lunacy of a person is in question, the Court will make a provisional order as to his effects, till the point of lunacy be determined. Provisional order. 3 Atk. 635.

The power of the Chancellor over ideots and lunaticks is by sign manual of the King, counter signed by the two Secretaries of State, empowering him to take care of them, in the right of the Crown, and to make grants of their estates. 3 Atk. 635.

A specific performance of an agreement was decreed against a person who had since become a lunatick. 1 Ves. 82.

A man found *non compos* before the senate of *Hamburgh* was considered a mortgagee, within the statute of 4 *Geo.* 2. *c.* 10. and was directed to convey. Specific performance. 1 Ves. 298. Trustee.

Commissioners and the jury have a right to inspect the person of a lunatic; and, if the commissioners think proper, he ought to be produced before them, without the prior order of this Court: and if the persons, in whose custody he is, have refused to produce him, the Court has made them pay costs. Produced to the commissioners. 2 Ves. 405.

Security changed.

Petition by a committee of a lunatick to have the bond delivered up, and a less security given, granted upon the circumstances.—So a security changed upon giving a greater security; but these applications are discouraged.

2 Ves. 673.

Contempt.

If one marries a lunatick, who is under the care of the committee of the court; this is a contempt, for which the person marrying may be committed; and marriage is no *supersedeas* of the commitment, so as to take the lunatick out of the custody of the committee.

Prec. ch. 203.

Report.

Where there is a reference to the Master, in a case of lunacy, he shall make his report although the lunatick be dead.

3 Bro. 238.

Jurisdiction.

The Lord Chancellor thought that the Court had authority to order timber decaying on the lunatick's estate to be cut down, but did not decide that point.

3 Bro. 510.
1 Ves. jun. 453.
2 Ves. jun. 71.

Passing accounts.

Committee of a lunatick's estate not permitted to pass his accounts without inquiry what money in his hands from time to time, and the Master to state particular circumstances; for the committee must not keep money in his hands without paying interest for it. And the brother of a lunatick, committee of the estate, who had managed it nine years before the commission, in which time there were considerable savings: ordered to pay interest.

1 Ves. jun. 156.

Costs.

Costs to the committee of the lunatick refused, because he had not past his accounts regularly, though no fraud.

1 Ves. jun. 296.

Waste.

The statute of lunaticks does not introduce a new right in the Crown. The words *waste* and *destruction*, in it, are to be considered in the ordinary, not technical sense.

2 Ves. jun. 71.

Trustee.

A trustee found a lunatick by the Master's report, cannot be ordered to convey under the statute 4 *Geo.* 2. *c.* 10. unless a commission of lunacy has issued.

2 Ves. jun. 587.

General principles.

For general principles upon cases of insanity, I shall refer the reader to the case of the Attorney-General *v.* Parnther and others.

3 Bro. 441.

Bankruptcy.

The bankruptcy of the committee of the person of a lunatick is sufficient for removing him from the management of the fund for maintenance, but the custody of the person will not be changed, if the Master find, that for the comfort of the lunatic it should continue.

3 Ves. jun. 2.

Timber.

Where timber makes part of the general rental of an estate, in case of lunacy, it must be managed as usual.

2 Ves. jun. 71.

MASTERS OF THE ROLLS, AND THE REST OF THE MASTERS IN CHANCERY.

[BY the ſtatute of 21 *H.* 8. *c.* 13. there are twelve Maſters of Chancery.]

[The Honorable the Maſter of the Rolls is one, and the chief.]

[His patent is for life: in it he is ſtyled *Clericus Parvæ Bagæ Cuſtos Rotulorum et Cuſtos Domus Converſorum Judæorum.*] His ſtyle.

[He taketh in open court his oath, which is ordained by the 18 *Ed.* 3. and is as follows.]

[You ſhall ſwear, "that well and lawfully you ſhall "ſerve our Sovereign Lord the King, and his people, "in the office of Clerk of the Chancery, to which you "are intitled. You ſhall not aſſent to, nor procure "the King's diſheriſon, nor perpetual damage, to your "power; nor ſhall you do, nor procure to be done, "any fraud to any man's wrong, nor any thing that "toucheth the keeping of the Seal. And you ſhall "lawfully counſel in things that touch the King, when "you ſhall be thereunto required; and the counſel "which you know touching him you ſhall conceal; "and if you know of the King's diſheriſon, or perpetual "damage, or fraud to be done upon things which touch "the keeping of the Seal, you ſhall uſe your lawful "power to redreſs and amend it; and if you cannot "do the ſame, then you ſhall certify the Chancellor, "or others, which may cauſe the ſame to be amended "to your intent."] Oath.

[He is Keeper of the records, judgments, and decrees of this Court.] Office.

[The records and rolls of Chancery, ſince the beginning of *Richard* the third's time, are kept in the Chapel of the Rolls, the reſt are kept in the Tower of *London.*] Records.

[The Maſter often ſits in court with the Lord Chancellor or Keeper; and, in his abſence, hears and determines cauſes there: and in the evenings, and at other times, when the Court at *Weſtminſter* or elſewhere, before the Lord Chancellor or Keeper, is not ſitting, hears and determines cauſes at the Rolls.]

How authorised. [Cardinal *Woolsey*, who was Chancellor the 29th of *H.* 8. is said to have introduced the Master's judging in causes in the Lord Chancellor's absence; and the Lord *Coke*, in the Preface to his third Report, says, he cannot conceive that the Master of the Rolls has a lawful authority so to do, or to determine causes at the Rolls, (as of later times has been used,) unless he be authorised by special commission under the Great Seal; which it seems he now is.]

[Ellesmere, 36.] [But heretofore, when he had no such commission, the acts done by him were entered as done either *per curiam* or *per cancellar.*]

Office. [He has a long time been ranked with the great officers of the realm, as appears by the statute 12 *Rich.* 2. *cap.* 2. where it is enacted, that the Chancellor, Treasurer, and Keeper of the Privy Seal, the Steward of the King's House, the King's Chamberlain, *the Clerk of the Rolls*, the Justices of both Benches, the Barons of the Exchequer, and others that should be called to the naming of Justices of the Peace, Sheriffs, Escheators, Customers, Comptrollers, *&c.* should be sworn to do the same faithfully, and without affection.]

Power. [He hath great power and pre-eminence by prescription, statutes, and commission.]

[Ibidem.]

Power. [Some have been of opinion, that by his office he is a general conservator of the peace. But it is said, he makes out process, and takes recognizances thereupon not by any power incident to his office, but by prescription.]

[Lamb. Inst. 10. 12]

Power. His Honor directed a case to the court of King's Bench, saying, he thought he had authority when sitting for the Chancellor, which was the case then, though not when sitting at the Rolls.

2 Bro. 88.

Masters in Chancery.

How appointed. [BESIDES the Master of the Rolls, the Chief, there are Eleven other Masters of Chancery: these Eleven are from time to time, upon death or surrender, appointed by the respective Lord Chancellors for the time being.]

[In ancient days they were sometimes created by the King's letters patent: but by Baggot's case, 9. *E.* 4. 5.

4, 5. this was at that time wore out of use, and they were made by the election of the Court, and swearing them.]

[It is said, the Lord Keeper *Egerton* ordered that there should be a *memorandum* of their admittance made on the close Rolls of the Petty-bag.]

[Their oath is the same with that of the Master of the Rolls.]

[Their office seems originally to have been partly to sit as assistants with the Chancellor; and still two or three of them, by turns, sit with him at *Westminster* in term time, and two at a time when he sits out of term; and two of them sit with his honor the Master at the Rolls.] Office.

[The other part of their office was to form writs, as occasion required; as where in some cases a writ was already given, which did not exactly suit another particular case, falling under the same reason with the former, they were to frame a new writ, according to the statute of *Westminster*, 2. *Ca.* 24. which enacts, *Quotiescunq. evenerit in Cancellaria, quod in uno casu reperitur breve, et in consimili casu cadente sub eodem jure simili indigente remedio non reperitur, Concordent Clerici de Cancellaria in brevi faciendo*, &c.]

[*Polidore Virgil* says, that *William* the Conqueror instituted a college or society of clerks in this Court, (then the *officina justiciæ* of the realm,) for the making all manner of writs which issued thence, among whom the *Clerici de primâ formâ* (the Masters) were a principal part.]

[The Clerks *de primâ formâ* were, as the Lord Chancellor *Egerton* says, grave and ancient Clerks, long experienced and skilful in the course and practice of the court.]

[At length clergymen and others, unskilled in the laws and course of the Court, were made Masters; so that the *brevia formata*, or *magistralia*, were, before the statute at *Westminster* 2. a long while disused, whereby the Judges of the Common Law were forced, in new cases, to allow the ancient forms of writs, and oblige the plaintiff to make a special count, where the writ did in substance warrant the count. And thus both the ancient business and name were forgot.]

[The later name of *Masters of Chancery* is retained at this day, in regard of the wisdom and skill which they are supposed to have.] Name.

[They keep also their ancient precedency to all other Clerks, and sit upon the bench with the Lord Chancellor or Keeper.]

Salary. [Each has one hundred pounds *per annum*, paid him quarterly out of the *Exchequer*, besides *robe-money*; which last is paid instead of robes, formerly allowed him out of the King's Ward-robe.]

By statute 5 G. 3. c. 28. two hundred pounds *per annum* is to be paid out of the general cash in the Bank of England, belonging to the suitors of the Court of Chancery, by half-yearly payments to each of the eleven Masters of the Court, to commence from the 5th of *June*, 1765.

[At this day, a recognizance acknowledged before a Master, and certified under his hand, is of that authority, that it is a matter of record, and as effectual as if it had been acknowledged in open court. Also all deeds or indentures, which are to be acknowledged in Chancery, must be acknowledged before some one of them.]

[Answers and affidavits are sworn before one of them, and by him signed.]

[Or. Ch. 119.] [They are by order to administer oaths reverently, and according to law.]

Accounts. [The business in Equity increasing, and the Master's business in forming writs decreasing or disused, the Lord Chancellors have of late time referred matters of account, and such like, to their examinations, which are ordinarily decreed according to their certificate or report.]

Contempts. [Exceptions likewise taken to answers and irregu-
[1 Px. Alm 38.] larities in practice, contempts, and such like, are referred to them.]

[It is said, the civilians contend, that the Masters in Chancery ought to be chosen from among them, because of their skill in the civil laws, which contain so much of equity beyond any other laws. But let us hear *Fleta*, lib. 2. c. 12. who says, *Est inter cætera officinum quod dicitur Cancellaria, magnæ diversitatis, quod vero, provide et discreto*, &c. *committi*, &c. *cui associentur clerici honesti et circumspecti, domino regi jurati, qui in legibus et consuetudinibus* Anglicanis *notitiam habent plenioremm.*]

[By an act of Parliament, 18 *Car.* 2. not printed, there is one public office to be kept by them, and no more, as near to the Rolls as conveniently may be;

in

in which the Masters, some or one of them, shall constantly attend for the administering oaths, caption of deeds, and recognizances, and the dispatch of all matters incident to their office, (references upon accounts and insufficient answers only excepted,) from seven in the morning till twelve at noon, and from two in the afternoon till six at night.]

[And they may demand and take the following fees:]

	£.	s.	d.	Fees.
[For every affidavit or oath taken in the office.]	00	01	00	
[For every bill of costs, taxed by them, for the plaintiff's not putting in his bill, or not proceeding to reply, or for the defendant's not appearing in due time.]	00	02	06	
[For the acknowledgement of every deed to be inrolled.]	00	02	00	
[For the caption of every recognizance.]	00	02	00	
[For every skin of an exemplification, to each of the two Masters that shall examine the same, 2s.]	00	04	00	
[For a report or certificate to be made in pursuance of any order made upon the hearing of the cause.]	00	20	00	
[For every other certificate or report, upon petition or motion, only 10s. to be paid by the party that takes out the report or certificate.]	00	10	00	

[And it is also thereby enacted, that if the said Masters, or any of them, shall directly or indirectly, by any act, shift, colour, or devise, have, take, or receive any money, fee, or reward, covenant, obligation, promise, or any other thing, for his report or certificate, in writing or otherwise, or for any other matters in the act expressed, other than the said respective fee or fees in the act mentioned, that then every such Master (being thereof legally convicted) shall thenceforth be disabled from the execution of his office, and shall forfeit to the party grieved so much money as shall be taken contrary to the act, and shall also forfeit an hundred pounds; a moiety to the King, the other moiety

to

to the party grieved, who shall sue for the same in any of the King's courts, by action of debt, bill, plaint, information, or otherwise, &c.]

Ord. Can. 79.

For more on the subject of Masters in Chancery, see 1 *Harr.* 73. and *Hargrave's Law Tracts.*

Masters Extraordinary.

[BESIDES the twelve Masters already mentioned, it hath, since the great increase of business in this Court, been found necessary to appoint one or more Masters extraordinary, in each county, for the taking of answers, affidavits, deeds, and recognizances, in the country.]

How the office is obtained.

[In order to obtain this office, there is commonly a certificate from some gentlemen of the country that there is occasion for a Master there; that the person who desires it is fit to be intrusted, and conformable to the Government.]

[Whereupon the Lord Chancellor grants a warrant under his hand to the Clerk of the Petty-bag, requiring him to prepare a commission, directed to three, empowering them, or any two of them, to administer the common oaths, as also that of a Master in Chancery extraordinary unto the party.]

[1 Cl. Tut. 31.]

[Then the Clerk of the Petty-bag makes the commission, (for which he is paid 1*l.* 13*s.* 4*d.*,) wherein the oaths to be administered are set forth *verbatim.*]

[Ibid. 32.]

[The commissioners on the back of the writ make this return, *Virtute istius commissionis nobis et al. in ead. commissione nominat. direct.* (*tal.*) *die* (*mensis*) *anno infra script. ministravimus seperal. sacra, in ead. commissione specificat. infranominat.* A. B. *prout per eandem commissionem nobis præcipitur.* J. N. J. S.]

[Which being returned up, the Clerk of the Petty-bag inrolls it in his office, and gives a certificate or memorandum thereof, for which he is paid 15*s.* 10*d.*]

[Ibidem.]

[And it is said the whole charge comes to 7*l.* 9*s.* 2*d.*]

[Ibidem.]

Not to act within 20 miles of London.

[Formerly these Masters Extraordinary were restrained from doing any thing incident to their office, within five miles only of *London:* but by an order of my Lord Chancellor *Clarendon* they are now restrained from doing any thing within twenty miles of *London*; and

and that it may appear whether they do or no, they are in the caption (which is the Master's certificate) to express the name of the town and county where they shall take any affidavit, or the acknowledgment of any deed or recognizance, otherwise the same shall not be held authentic, nor be admitted to be filed or inrolled.] [Ord. Canc. 58.]

[It seems necessary that not only the time, but also the place, be inserted in the caption of an affidavit; and that not for the aforesaid cause alone, but that if the party has made a false oath, it may be certainly known where the indictment, *&c.* is to be laid.] Caption of an affidavit.

[Commissions are frequently granted to take the acknowledgment of a deed in the country; though it is said the Masters Extraordinary claim it as their right.] Acknowledgment of deeds.

MONEY.

VIDE

Interest.
Answer.

[WHERE, by an interlocutory order, a party is to bring money into court, and he does it not, the Court, on motion, will limit him a day, by which he shall do it or stand committed; but before commitment, the order must be personally served under seal, and an affidavit made of the service.] Paid into court.

[Before a party moves to have money out of court, whether it be in the hands of the usher, or of a master, *(this was before the stat.* 12 *Geo.* 1.) there must be personal notice of the motion to the adverse party; except, by special order of the Court, it be for some reason dispensed with, and notice to the clerk or other be made sufficient.] Taken out of court. [1 Pr. Alm. 40.]

[Money paid into court is sometimes before hearing paid to the party that seems to have the best right thereto, upon recognizance with two sureties to abide the further order of the Court on hearing.] When paid out of court.

[Where the sum was so small as eight pounds, the Court, to save the party the charge of the recognizance, ordered it to be paid, upon the party's giving judgment

judgment at law in debt and a release of errors, and a second *scire facias* returned, to prevent the defendant's surrendering himself in discharge of his bail.]

[Money in court was ordered to be paid to a party: he dies: his administrator moves to have it; the other party, on notice, opposed it. It was ordered, that upon producing letters of administration, the administrator should have it.]

[If money in court has been ordered to be paid out upon security, and a deceit has been put upon the Master in doing it, or that there be great reason to fear the ability of the security, upon shewing this to the Court, the money will probably be ordered to be brought in again. Where the matter was denied, and it was doubtful, the Court ordered it to be examined by another Master.]

But now all sums of money ordered or decreed to be paid into this court, must, pursuant to the statute 12 *Geo.* 1. be paid into the *Bank*, with the privity of the Accountant-General of this Court, and placed to the credit of the cause; and any of the parties to the suit, where money is ordered to be paid into the *Bank*, may apply by motion or petition, that such money may be laid out and invested in Government Securities, for the benefit of the parties in the cause.

2 Har. 194. Hind. 494.

The party entitled to money in this court, in order to obtain the same, must give notice in writing, to all the parties in the suit, of his intention to move the Court, that the specifick sum to which he is entitled, may be paid or transferred to him. This motion must be made upon the Master's report in favour of the party applying, and the Accountant-General's certificate.

Har. 195.

Har. 196.

Parties only, or their legal representatives or assigns, can obtain money from the Accountant-General's office. Representatives must shew themselves to be such, by producing letters of administration, probate of the will, or assignment, as the case may be, before they can receive the money. If a party cannot attend to receive the money due to him, he may execute a letter of attorney, empowering such person as he pleases to receive the same. This letter of attorney is usually made out at the Accountant-General's office.

Ibid.

Where money by order is paid into the Accountant-General's office, to be placed in the *Bank*, till it can be

be laid out according to the directions of a decree, if you move for an application of this money, you must not only have a certificate that the money was paid into the *Bank*, but that it is in the *Bank* at the time of the motion made. 1 Atk. 519.

Money in the funds belonging to wards of the Court cannot be transferred into the name of the Accountant-General, to the credit of the cause, until the account is taken by a Master, and his report made. 1 Bro. 56.

Affidavit.

The affidavit, supporting a motion to pay money into court, must specify the sum in the defendant's hands, or the motion will be refused. 1 Bro. 57.

Injunction.

When plaintiff moves for an injunction to stay proceedings at law, he must bring the money which is in dispute, into court. If it has been granted for want of answer, it will be dissolved, unless the money be brought into court. 1 Bro. 452. 2 Bro. 14. 2 Bro. 182.

Balance.

The Court will not order a balance, upon charge and discharge in the Master's office, to be paid in before the Master has made his report, notwithstanding his certificate of the sum. *Sed vide* 3 *Bro.* 647. *contra.* 3 Bro. 45.

Answer.

The Court will now, immediately upon coming in of the defendant's answer, order so much as he admits to have in his hands of a testator's property, to be paid into the *Bank*. It was formerly thought necessary for the plaintiff to shew that the executor had abused his trust, or that the fund was in danger from the insolvent circumstances of the executor. 3 Bro. 365.

Motion that plaintiff's solicitor, who had been served with an order to pay a sum of money, which he had received beyond his costs, should stand committed. Lord Chancellor stated the practice to be, that if you want a more summary proceeding than an attachment, you must move that the party bring in the money by a short day, or stand committed. 3 Bro. 3-2.

The Court will detain money decreed to parties, upon application of persons having claims upon them. 4 Bro. 430.

But the Court will not keep money in the hands of the Accountant-General after the party is entitled to it, even at his request. *Vide* 2 *Harr.* 194. 1 Ves. jun. 44.

MOTION.

VIDE.

Notice, &c.

What.

[A MOTION is a prayer or requeſt *ore tenus* of the party to the Court, either in perſon or by counſel.]

Of courſe.

[Some motions are of courſe, (that is,) where by a ſtanding rule, or the known courſe of the Court, a thing deſired is to be granted without hearing the other party.]

[In theſe there needs no notice of the motion to the other ſide, nor ought counſel to oppoſe them.]

[There are others would be of courſe upon ſuppoſition of the facts ſtanding ſingle. But becauſe there may probably be ſome other fact or circumſtance reſting in the knowledge of the parties, and which the Court cannot at preſent ſee, which yet oppugns the reaſon of the motion, they are granted only *niſi*, &c. If there be not notice of the motion, or if there be, yet all are not abſolutely granted.]

Special motions.

[There are others not founded on ſuch general rule or uſage, and ſometimes beſides or againſt it, which are granted or denied, as the Court ſees fit, upon the weight and reaſon of the matters, as it appears upon the motion, or upon hearing of both ſides.]

[Some of theſe, of ſmall moment and frequent, are generally granted without notice: if leſs frequent, and of more weight, then only *niſi*, if no notice.]

[Such of them as are very rare, and upon extraordinary occaſions, will ſeldom be granted in any ſort without notice.]

Notice of motion.

[Notice of a motion muſt be given in writing, ſigned with the name of the party, his clerk or ſolicitor, that gives it.—It muſt be delivered to the other party, or his ſolicitor (or at leaſt left at one of their houſes, though I have heard it ſaid, that this is not ordinarily good ſervice); or, which is more uſual, it muſt be delivered to the clerk in court, or left at his ſeat in the office, with his clerk or ſervant.]

Affidavit of ſervice.

[Before you move, affidavit muſt be made of the ſervice, and the manner of it, and the affidavit filed, and

and a copy taken thereof, if you think you shall need to prove notice.]

[Every notice of motion must be given two days at least before the day on which it is to be made, as if the motion is to be on *Thursday*, the notice must at least be on *Tuesday*.] If on *Monday*, the notice must be on *Friday*, *Sunday* being no day. Notice. 2 Har. 129.

[Where notice is necessary, every thing the party moves for should be expressed: for the Court will not ordinarily extend the order beyond the notice: as, where notice was, that the Court would be moved that the plaintiff might be put into possession, and a receiver appointed; the Court would not order that nothing should be received by the defendant in the mean time; though the defendant did not defend the motion.]

[So, notice was given of a motion to supersede an *excommunicato capiendo*, because the Bishop's seal was not to the *significavit*; which, upon the motion happening otherwise, the counsel would have insisted, that the *excommunication* was before the last general pardon: but the Court would not hear them to that, till another day, because there was no notice given of this exception, which there ought to have been, though there needed none of the other, which any one as *amicus curiæ* might have shewn, had it been true.]

[Said, if a party gives notice three times, that he will move a matter, and yet does it not]; the same notice shall not be moved a fourth time; but [he shall ordinarily] upon production of the four notices [pay the other ten shillings costs; but if it be a matter of weight, and many counsel are feed, the Court will order costs to be taxed by a Master.]

[Notice of motion to take money out of court, must be to the party himself, except the Court, upon a previous motion, have ordered so many days notice to the clerk in court, *&c.* as may be time enough to send the client notice, and to have his answer if he be in the kingdom; but hard to be found, or so, shall be sufficient.] [1 Px. Alm. 40.]

[During the term, every *Thursday* is a day for sealing and motions only, except it happens to be the second day of the beginning, or the last day, save one, of the end of the term.] [Or. Ch. 53.]

[So are *Tuesdays* and *Saturdays*. *Pref. Ord.* So the first and last days of the term are only seal days, Ibid.

and

and days of motion]; but motions of course may be
2 Har. 130. made any day at the rising of the Court, and sometimes special motions.

[In vacation, seal days are only days of motion, and are appointed by the Lord Chancellor.—Yet the morning after the term, motions are always made at the Rolls, upon supposal (I guess) that some may probably remain, which should have been moved, but could not the last day of the term.]

[No motions are heard after the last general seal after term, till the first general seal before the ensuing term. But things which require dispatch may be petitioned for, and right will be done; for this court is always open.]

[It has been said, that there is seldom occasion for more than one motion in a cause, (*viz.*) for an injunction for quieting possession, or staying suits at law; other motions being for the most part needless, or not tending to end, but perplex the cause; and a cause would be soon ready for hearing, if it went on in an orderly course by pleadings and proofs, without being crossed by frivolous motions.—Wherefore the solicitor
[3 Px. Alm. 12.] ought to be very careful, not to lead his client into needless and expensive motions.]

[Many motions are now made touching the regular issuing forth and execution of commissions, process, and other matters of course, which heretofore were commonly referred to four of the six clerks not in the cause, who, hearing the other two clerks toward the cause, did easily determine the question without
[Pr. H. Ch. 33.] delay or charge to the suit.]

[Where by reason of the absence of a counsel who should have defended a motion, the Court thinks fit to put it off for that time, the former notice is often ordered to be continued; so as the matter may be moved another day, upon notice to such absent counsel only.]

[Said, on a day of motion after all were over, it hath been used, that the Register read over in court, before the Lord Chancellor, all the orders of the day.]

The Court will not, upon motion, make an order
3 Bro. 366. which will decide the merits of the cause.

The variety of shapes in which motions are made in this court to obtain relief, according to the peculiar circumstances of each case, renders it impossible to

 state

ſtate every poſſible form in which a notice of motion may be given; the forms of notices in the book referred to in ordinary caſes, may be ſo far deſcriptive of the general outlines of a notice of motion, as to give an idea to the young practitioner, of the form in which ſuch notices are generally conceived. 3 Har. 132.

NE EXEAT REGNO.

[IS (as the name imports) a writ to reſtrain a ſubject from going out of the kingdom.] What.

[By the common law any man might go out of the realm at his pleaſure, without the King's licence, except he were interdicted by proclamation, writ or mandate under the privy ſeal or ſignet.] [Nat. Br. 85.]

[But by the ſtatute of 5 *Ric.* 2. *c.* 2. none except Lords and other great men, notable merchants, and the King's ſoldiers, were to go out without the King's ſpecial licence.]

[Formerly this writ was ſometimes directed to the party himſelf, ſometimes to the Sheriff or Juſtices of the Peace, or both; but now it is commonly directed to the Sheriff only.] How directed. [Nat. Br. 85. 1 Px. Alm. 159. Cl. Tut. 294.]

[Any one by ſurmiſe made to the Lord Chancellor, may have this writ from the Queen.] [F. Na. Br. 85. Fr.]

[It was formerly reckoned a writ of grace [on behalf of a ſubject] and uſed to be granted at the mere pleaſure of the Court, on affidavit or other matter, ſhewing the party deſigned to go out of the realm, to the other party's damage: yet it was ſaid, a defendant could not have this writ on affidavit as a plaintiff might.] How granted.

[It is ſaid to have been ſettled by the late Lord Keeper *Wright*, that it being a remedial writ, is as ſuch, upon due application by petition, or motion, to be granted the ſubject.]

[It is now moſtly uſed where a ſuit is commenced in this court againſt a man, and he deſigning to defeat the other of his juſt demand, or to avoid the juſtice and equity of this court, is about to go beyond ſea,

or however, that the duty will be endangered, if he goes.]

[If the writ is prayed, and the party, by answer or otherwise, satisfies the Court that he is not going beyond sea, it will not be granted.]

In what sum marked.

[The party that sues it, commonly marks on the back of the writ in what sum, the bond for yielding obedience to the writ shall be.]

[*It is generally one thousand pounds, or some great sum.*]

How executed.

[It is an abuse of this process to break open doors and take the party in bed; but yet the Court would not order him, for this cause, to be set at liberty.]

[If the writ be sued for the Queen, the party against whom it is, may come into this court, and (upon good cause shewn) obtain licence by letters patent, or by privy seal or signet, (which are called a passport or pass,) any of which will excuse him from contempt.]

F. N. Br. 85.

What security.

[If the writ be granted on behalf of a subject, and the party is taken, what is generally done is this: the party either gives security by bond, in such sum as is demanded; or he satisfies the Court by answering, (where the answer is not already in,) or by affidavit, that he designs not to go out of the realm, and gives such security as the Court directs; and then he is discharged.]

When a party is taken, he must give a bond to the Master of the Rolls, in such penalty as is required by the writ for yielding obedience thereto, or satisfy the Court by answer, affidavit, or otherwise, that he hath no design of leaving the kingdom, or that he is not indebted to the plaintiff in any sum of money whatever, before the writ can be discharged.

Mind. 612.

The present practice is for the defendant to give security to abide the decree, before the writ is discharged, which security is taken by recognizance before a Master.

So a person taken by the Sheriff on a *ne exeat regno*, must enter into three different bail-bonds before he can be set at liberty; *viz.* in one to the Sheriff, in one to the Master of the Rolls, and in a third to a Master in Chancery.

Ibid.

[Whilst this was accounted a writ of grace, if the party to whom the writ was, had answered and denied the equity of the plaintiff's bill, and the Court saw no cause to the contrary, the writ would be superseded.]

[And

[And so I suppose it now will.]

When it lies.

This writ lies for a private matter, without bill filed. As for client, on his solicitor's bill, on taxation being over-paid 60 *l.*. solicitor being about to go beyond sea. *Sed vide* 3 *P. W.* 313.

Ch. Ca. 116. Ch. Rep 19. 2 Ch. Ca. 245. 1 Vern. 77. Prec. Ch. 171.

Surety.

A surety in a *ne exeat regno* is not to be discharged upon the defendant's putting in his answer, not even after a decree against the defendant, and commitment decreed against him; for if there be no danger of the defendant's going beyond sea, being in prison, then the surety is no danger.

Prec. Ch. 230.

To prevent going to Scotland.

A *ne exeat regno* lies to prevent one going to *Scotland*; in which case the condition of the recognizance must be not to go out of the realm, or to *Scotland*. *Sed vide Ca. temp. Talbot* 196.

1 P. W. 263.

It lies also for a defendant, in an account against a co-defendant.

Ibid..

In what cases.

This writ is not granted where the demand is at law; for there the plaintiff has bail, and he ought not to have double bail both at law and in equity. But it lies for alimony *decreed* by the Spiritual Court, but not before decree.

3 P. W. 314. Amb. 76. 2 Atk. 210. Ch. Ca. 115. 1 Ves. jun. 94.

Against feme executrix.

This writ was granted against a married woman, executrix, the defendant, her husband, having left the kingdom and taken away his effects.

Amb. 62. 3 Atk. 409.

In what cases.

Will not lie if defendant is going to a place subject to the laws of *England*, and where his effects are.

Amb. 76. 177.

Not on behalf of the wife against the husband.

Not granted for the wife against her husband in respect of a demand arising by virtue of a marriage settlement, whereby the defendant obliged himself to secure a sum of money out of his real and personal estate, as a provision for his wife *in case* she survived him: as the contingency might never happen.

1 Atk. 521.

On motion to prevent the defendant's going out of the kingdom till he had put in his answer, the Court ordered that he should give security by his clerk in court, to be approved by a Master to abide the decree.

2 Atk. 66.

How granted.

The plaintiff must swear positively that the defendant is indebted to him in a certain sum, or the writ cannot be indorsed;—and state good grounds for the suggestion that he means to abscond, or the motion for a *ne exeat regno* cannot be granted, if the bill be for an account only, and the plaintiff swears that he verily believes the balance in his favour will amount to so much, it will be sufficient.

2 Ves. 490 1 Ves jun. 94. 3 Bro. 477. 3 Atk. 501. 3 Bro. 224. 370.

2 Bro. 376.
3 Bro. 218.

A *ne exeat regno* never can be granted, but upon a *clear* demand, and no equity can arise here from a contract *legally* satisfied in a country where it arose.

3 Bro. 11.
1 Vez. jun. 49.

The affidavit of the wife, in support of an application for a *ne exeat regno* against her husband, cannot be received.

If it appear to the Court that a bill for a *ne exeat regno* must be dismissed for want of parties, the motion for a *ne exeat regno* will be refused.

3 Bro. 23.

Writ of *ne exeat regno* obtained by one inhabitant of *Antigua* against another, upon a bond stated in the bill to be lost, discharged, on giving security to abide the decree.

3 Bro. 218.

Where plaintiff has two demands on defendant, the one liquidated, the other matter of account, the writ of *ne exeat regno* shall be marked for the former demand only.

3 Bro. 427.

Ne exeat regno discharged, upon paying into court the sum for which it was indorsed.

1 Vez. jun. 96.

Vide Done's Case, 1 *P. W.* 262.

NON COMPOS MENTIS; DUMB, &c.

VIDE

Witness.
Answer.
Guardian.

[H. Ch. 124.
Toth. 140.]

[A DUMB man hath been ordered to answer a bill.]

[So—upon interrogatories.]

[Cary, Rep. 132.]

[But one dumb and senseless, so that he cannot instruct his counsel to draw his answer, shall not be put to answer.]

3 P. W. 111. in notis.

One through great age being deprived of his memory, and being almost *non compos mentis*, was ordered to answer by his guardian, the demand in question being small.

NOTICE.

NOTICE of motion muſt be given in writing, and ſigned with the name of the perſon who gives it, which is commonly the party's clerk or ſolicitor, and it muſt be delivered to the other party or his ſolicitor (or at leaſt left at one of their houſes, though it is not ordinarily good ſervice); or, which is moſt uſual, it muſt be delivered to the clerk in court, or left at his ſeat in the office with his clerk or ſervant. How ſerved. Cur. Can. 424.

Before the motion is made, affidavit muſt be ſworn of the ſervice of notice, and of the manner of it, and the affidavit filed, and a copy thereof taken; and every notice of motion muſt be given two days at leaſt before the day on which it is to be made; as if the motion is to be on *Thurſday*, the notice muſt be given at leaſt on *Tueſday*, and the affidavit thereof filed on *Wedneſday*. Affidavit of notice. Ibid.

And where notice is neceſſary, it muſt be in writing: every thing the party moves for ſhould be expreſſed therein: for the Court will not ordinarily extend the order beyond the notice; as where the notice was, that the Court would be moved, that the plaintiff might be put into poſſeſſion, and a receiver appointed, the Court would not order that nothing ſhould be received in the mean time, though the defendant did not defend the motion. Where neceſſary. Ibid.

So notice was given of a motion to ſuperſede an *excommunicato capiendo*, becauſe the Biſhop's ſeal was not to the ſignificavit; which, upon the motion happening otherwiſe, the counſel would have inſiſted, that the excommunication was before the laſt general pardon; but the Court would not hear them to that till another day, becauſe there was no notice given of this exception, which ought to have been; though there needed none of the other, which any one as *amicus Curiæ* might have ſhewn, had it been true.

Notice of motion to take money out of court, muſt be given to the party himſelf, except the Court, upon a previous motion, has ordered ſo many days notice to the clerk in court, *&c.* as may be time enough to ſend the client notice, and to have his anſwer; or if he be in the kingdom, but hard to be found, *&c.* ſuch notice may be ordered to be ſufficient. Taking money out of court. Ibid.

Notice continued. Cur. Can 424.

Where, by reason of the absence of a counsel who should have defended a motion, the Court thinks fit to put it off for that time, the former notice is often ordered to be continued, so as the matter may be moved another day upon notice, *to such absent counsel only.*

Costs. Ibid.

If a party give notice three times that he will move a matter, but does it not, he shall ordinarily pay the other 10*s.* costs; but if it be a matter of weight, and many counsel are fee'd, the Court will order costs to be taxed by a Master.

3 P. Will. 103.

Notice of motion given by one not allowed to act as a solicitor, not good.

ORDER.

VIDE

Decree.

[ORDERS are sometimes about the commencement of a suit; sometimes touching the process and proceedings in it; other times with respect to the end and fruit thereof.]

General.

[Some are general and standing ones.]

[Others are founded on the general ones; and others again are upon particular circumstances;—And.]

How made.

[Both these are commonly on petition or motion of some of the parties in a cause or suit, or of a party about to commence a suit;—but they are sometimes upon the petition or motion of another party that is some way interested in the cause, or affected by it.]

By consent.

[Sometimes they are by consent of parties; and then they are commonly besides or beyond the law or common usage of the Court.]

Interlocutory.

[Some orders are interlocutory; others decretal or final.]

By whom drawn.

[Every order must be drawn up by the Register, who sat in court and took notes or minutes thereof in his book, when the same was pronounced.]

[Which, that it may be the better done, the Solicitor should, after the rising of the Court, if the order be

be any thing ſpecial, go to the Regiſter's office, and there take a copy of the minutes, and give them to the Regiſter, and explain them to him; ſo that he may draw the order up right, and to his client's juſt advan- [Com. Sol. 43]
tage.]

[No draught of any order ſhall be delivered by the Regiſter to either party without keeping a copy by him; to the end that if the order be not entered, yet the Court may (if needful) be informed what was formerly done, and not put to a new trouble; and to the end alſo, that knowledge of orders be not kept too long from either party, but may preſently appear at the [Toth. 39.]
office.]

[The Regiſter upon delivery of the draught of any order to the counſel, &c. of either party, is not to reſpect the interlineations or alterations of the counſel, (be he ever ſo great,) further than to be truly put in mind of what was delivered in court; and ſo to conceive and frame the order according to his oath and [Toth. 40.]
duty, without any other or further reſpect.]

[If there be any doubt of the meaning of minutes, the Regiſter gives the clerk or Solicitor, who deſires the order to be drawn up, a ſummons to the clerk or Solicitor on the other ſide, appointing a time for both ſides to attend him, in order to ſettle it.]

[If by this means it cannot be ſettled, the Court muſt be applied to, to explain the minutes.]

[If the order be of courſe, the Solicitor generally thinks it ſufficient to draw up his minutes of his own head, as ſuch matter is commonly ordered, and give them to the Regiſter's clerk to draw up the order by.]

[An order drawn up by the Regiſter muſt be given his entering clerk to be entered; which done, the Regiſter will ſign and paſs it; and then it is perfectly authentic, and you may, when there is occaſion, ſerve the other ſide therewith, (*i. e.*) give the other notice of it, by ſhewing it, and delivering a copy thereof; or [Com. Sol. 40]
you may read it in court, &c.]

[*This is to be underſtood of interlocutory orders, and ſuch like.*]

[The Regiſter is to ſet down orders, as they are p onounced by the Court, truly at his peril, without troubling the Lord Chancellor by any private attend- [Toth. 39.]
ance to explain his meaning.]

[And regularly, no order made in open court is to

be altered, crossed, or explained upon any petition; but such order may be stayed by petition for a small time, till the matter may be moved in court.] [2 Toth. 34. 39.]

[Yet if a Register draw and pass an order, contrary to the intent and direction of the Court, the Lord Keeper or Master of the Rolls, he, before whom it was moved, will sometimes upon petition (when, I suppose, the same cannot be moved in time, as in vacation,) appoint a day for both sides, with the Register, to settle it.] [1 Px. Alm. 12.]

[All orders drawn up by the Register are to be signed and entered in due time.] [Ibid.]

[Yet if an order be entered, they often omit the Register's hand to it, except it be of great moment, as a decretal order, or so, and think it well enough.]

[*But it is good to observe the rule.*]

[Said, no orders but final and decretal ones may be received to be entered after eight days, from the day of pronouncing them.] [Com. Att. 447. Com. Sol. 45.]

[After orders are entered, they may not upon any occasion whatsoever be in anywise altered, without special order and direction of the Court.] [Com. Sol. 44.]

[Where any order is had, and a former order any way material for the Court to take notice of was made in the cause touching the same matter, and which the Court, upon moving for the later order, was not truly or fully informed of; no benefit shall be taken by the later order, which the Court will upon motion quash or alter as surreptitiously obtained.] [Com. Sol. Toth. 38]

[Wherefore the Register, in drawing up a present order, doth always mention such next preceding order, which the Solicitor should take care be fully and truly recited; lest any omission or mistake in the recital should occasion damage to his client.] [Com. Sol. 43.]

[An order against, or out of the general rules or course of the Court, must express the special reasons moving the Court to vary from the general rules, &c.] [2 Toth. 38.]

[Just before the rising of the Court, you may move to have an order *nisi causâ*, &c. made absolute, which the Court commonly grants; provided cause be not shewn before the Court rise: yet if moved early in the day, it has sometimes been refused, and the party bid to move it at the Rolls in the evening: because the party has all the day, during the sitting of the Court, to shew cause.] [1 Px. Alm. 41.]

[An

[An affidavit of the service of the order is necessary to such motion.]

[Without motion, such order *nisi*, &c. is not *absolute*, though no cause be shewn; except it be expresly said in the order, *without further motion*.]

[If you move not to make such order *nisi absolute*, till some time after the day given to shew cause, you must not only produce an affidavit of the service of the order, but a certificate from the Register, that no cause is shewn to the contrary. And if then, upon moving, none shew cause, the Court makes it absolute.] [1 Px. Alm. 40]

[An order *nisi* founded on affidavit was obtained; no notice having been given of the motion: at the day to shew cause, the adverse party's counsel shewing cause, insisted that the affidavit should have been mentioned, and referred to in the order; that so the party might have been able to answer it, which he could not now do, knowing nothing of it. The Court said, if the affidavit had been since the order, the adverse party must have had time to answer it: but being otherwise, the party was allowed to go on with the motion, though the counsel on the other side much opposed it.]

[If the side which draws not up an order bespeaks a copy of it drawn up, but not passed; four days are allowed to return it with objections if he has any to it.] 1 Px. Alm. 42.

[A submission to an award may be made an order of this Court, *per* 9 *Will.* 3. *cap.* 15.]

[If he, upon whose motion, or for whose benefit an order is made, does not draw it up, *&c.* he cannot ordinarily make any use of it, or have any benefit by it.]

[Yet where a bill to redeem the wife's inheritance was dismissed with costs for want of prosecution, the order not drawn up, the plaintiffs pray to retain the bill; the defendant makes affidavit of the husband's being beyond sea, and prays, that before the bill be retained, the plaintiffs may have the costs of the dismission, *&c.*]

[The Court ordered the plaintiffs to give security, to redeem and to pay the costs on the dismission, if they were taxed, else not, and then the bill to be retained.]

[But the general course is, that if either party will make any use, or expect any benefit by an order, it must be drawn up and perfected.]

[Orders

[Orders after decree passed are never to retract from the decree; but to carry it on with effect.] [3 Px. Alm. 21.]

Service.

[The usual way of serving an order is to shew it to the clerk or Solicitor on the other side, and give him a copy of it; or to leave a copy of it with some person attending the clerk's seat in the office, and shew him the order. But till the order under seal be served on the party himself, he is not ordinarily brought into contempt, nor to be committed for disobedience.]

[Yet, in case of an order made against a Solicitor, or other person, or minister attendant to the Court, it is said to be otherwise; because he is supposed to be present, and know, or easily able to inform himself with certainty of what passes in court.]

[An order for payment of costs, or other money, must be personally served, and the costs demanded; and if the party to whom money is payable serves not the order himself, he must give him that serves the order a letter of attorney, or like authority, to demand and receive the money.]

Disobedience of an order.

[Disobedience to an order, which enjoins the not doing of a thing, is looked upon as a greater contempt than where somewhat is commanded to be done: the first being always in a man's power; the other not so.]

By whom discharged.

[An order made by the Lord Keeper may in court be discharged by the Master of the Rolls when he only is sitting there.]

[But if it be a matter of difficulty, he will not ordinarily meddle with it, except by consent of parties.]

[Where a cause has been debated upon the hearing of both parties, and opinion hath been delivered by the Court; and, nevertheless, the cause referred to treaty; the Registers are not to *omit the opinion* of the Court in drawing the order of reference, except the Court do especially declare that it is to be entered without opinion either way. In which case, nevertheless, the Registers are, out of their short notes, to draw up some more full remembrance of what passed in court; to inform the Court if the cause should come back not agreed.] [Toth. 38.]

[If you move to discharge an order, you ought to have it drawn up and ready to shew the Court; that the Court may see and judge of the order, and the reasons upon which it was made.]

Where

Where there has been an order that a cause should stand over indefinitely, it does not imply that the cause is put off only to the next term. 2 Atk. 2.

The parties interested in an order for the appointment of a Receiver, print it with a recital of the material facts in the cause, relative to the order. This is not a contempt, but highly discountenanced by the Court. Contempt, what. 2 Atk. 488.

To enter an order *nunc pro tunc* is a motion of course, where the party comes recently; but after a length of time there ought to be notice of such motion. 3 Atk. 521.

An order made on a petition cannot be discharged on motion, unless *ex parte*. 2 Ves. 113.

Where an order is made upon hearing counsel on both sides, there is no occasion to serve it. *Service.* Mosely 202.

Solicitor's assent to interlocutory orders may bind, but not to a reference finally to determine. *Assent.* 1 Ch. Ca. 87.

A mistake in the title to an order, amended, though against a surety that gave a recognizance to abide the order upon the hearing. Mistake. 2 Vern. 376.

PARTIES TO THE SUIT.

VIDE

Witness.
Proofs.
Baron and Feme.
Aid Prayer.
Trustee.

[IN all suits great care should be had, that there be proper parties for and against whom the Court may respectively make a decree; and also that there be all necessary ones: for if upon the face of the bill it appears, that any of these are wanting, the defendant may for that cause demur: or if he does not, yet the Court many times upon hearing will not, for want of them, proceed to a decree: or if it does, the decree may be reversed: or if it be not reversed, yet none but the parties to the suit, and those claiming under them, are bound by it.]

[Each

[Each party sues and defends either at his own charge, or without charge in *forma pauperis*.]

[The suit is sometimes prosecuted and defended in each party's own name only, sometimes by another as next friend, guardian, &c.]

[It is either in the party's own right, in the right of another, or in both.]

[Of the second sort are suits by executors, administrators, trustees, husbands, and such like.]

[Of the last sort are some by baron and feme.]

[Ordinarily, several plaintiffs may not join for different causes; nor may several defendants be put in one bill, where the cause and charge against them is altogether different.] [Pr. H. Ch. 6.]

[Yet sometimes for avoiding multiplicity of suits, and to bring all parties who may be affected by the decree, before the Court, the suit is by parties who have separate rights and interests, as devisees, legatees, creditors, and such like.]

[Care should be likewise taken, that whosoever sues in his own right, should have no legal disability upon him, as outlawry, excommunication, an alien enemy, &c. for if he has any, it may be pleaded.]

[But said, where alien enemies by permission come here for refuge, and live peaceably, the Court will greatly discountenance a plea of alien enemy.]

[If the legatee of a term sues for it here, the executor must be party, though he hath assented to the legacy.] [1 Ch. Ca. 177.]

[Ordinarily, the wife must not sue without her husband: yet, in case of separation, or some unreasonable dealing of the husband, or his being beyond sea, she may. *Vide Baron and Feme*, Plea.] [Cary Rep 124.]

[Said, in some cases a trustee may sue in his own name; but ordinarily *cestui que trust* must be a party.] [Toth. 187.]

[Said, by motion of course, either plaintiffs or defendants may add parties before answer.]

[Plaintiffs may be struck out of the bill any time before hearing; so that those left are sufficient to answer the costs: or if they be not, yet it may perhaps be allowed upon giving security to answer the costs.]

[So a defendant may be struck out any time before hearing; but if it be after appearance, it will be with costs; the bill as to him being dismissed.]

[If a defendant, &c. be added after publication, the cause

cause as to him must be heard upon bill and answer only.]

[Before a defendant has answered, his name may, upon the plaintiff's motion, be struck out of the bill.]

[So if a defendant, by answer, disclaim all interest in the matter in question, or appears to be a disinterested person, his name may commonly be struck out at the request of either plaintiff or defendant. *Vide* [Pr. H. Ch. 12] *Disclaimer.*]

[A defendant examined in chief, (*viz*) as a witness to the matter in issue, by both the plaintiff and defendant, before hearing, may be examined on account after hearing, if there be no order made to the contrary upon the hearing.]

[Any time before examination the Court will suffer the plaintiff to amend his bill and add parties; and without costs if there be no plea or demurrer, and so as the addition be not so great as the defendant will need a new copy of the bill, nor need put in a further answer, and that the plaintiff amend the defendant's copy according to the addition, *&c.*]

[Said, the Court will, after publication, and any time before hearing, upon cause shewn, suffer parties to be added.]

[Said, after a decree, and before it is inrolled, persons interested may, by petition, be made parties and let into it, if their right be interwove with the other plaintiffs, and settled (in the general) by the decree; they paying the plaintiffs a proportionable part of the charges of the suit, *&c.*]

[If, before hearing any of the parties, plaintiffs or defendants, die, or if a feme plaintiff marry, the suit abates, and must be revived by bill: if after hearing and decree inrolled, it is revived by *subpœna scire facias* ordinarily. *Vide Subpœna Bill.*]

[If one be named plaintiff without his privity or order, he may come into court and renounce the suit; or he may give a warrant under his hand and seal to counsel to move and consent that the bill be dismissed; or, if there be more plaintiffs, that it may be dismissed as to him, and it will be dismissed accordingly.]

[A purchaser exhibited his bill here to be relieved against a fraudulent vendor, who by a surreptitious judgment at law had recovered the purchase money, and levied it upon the bail, to whom the Court at law

had therefore ordered restitution. Upon consent of the plaintiff and defendant in this court, the money levied was by order paid into a third person's hands, who was to see if he could end the matter between them by reference. If he could not, then the money was to be repaid into this court, subject to order of the Court. He does not end it: the vendor prays the money may be brought into court. The bail oppose it, because he was neither party to the suit nor order; yet the Court ordered the money to be brought in according to the former order.]

All persons interested.

Bill as to the moiety of a residue; the other moiety was given to *A.* (one of the defendants) for life, and upon her decease, to such persons as she should appoint, and in default of appointment, to certain other persons, who were thought necessary parties, notwithstanding their interest was upon such a remote contingency.

3 Bro. 229.

Arbitrators.

In a bill to be relieved touching an award made by some of the members of the *East India* Company, concerning the quantum of freight due to the plaintiff from the company; the arbitrators and some of the particular members being made defendants. They demurred to the whole bill, and demurrer allowed.

2 Vern. 380.
2 Atk. 396.

Assignee.

Bill against a trustee (in a mortgage deed, by which an annuity of 30*l.* *per annum* was secured to plaintiff) who had assigned his trust; the assignee ought to be made a party; as the decree should be first against him, and the trustee to stand as a security.

2 Bro. 225.

Assignor.

To a bill by assignee of a judgment, assignor is a necessary party.

1 Ves. jun. 463.

One of two joint executors and residuary legatees assigned his interest, and died; the assignee filed a bill to have half the residue transferred to him. The representative of the assignor need not be a party unless there appear any doubt of the validity of the assignment.

Anstr. 651.

Attorney-General.

Attorney-General need not be a party to a bill relating to a private charity, such as a voluntary society, to provide for the members and their widows by weekly contributions.

3 Atk. 277.

J. S. owed the plaintiff 100*l.* and the defendant *Fry* owed *J. S.* 100*l.* on note, and the plaintiff having outlawed *J. S.* brought a bill against *J. S.* and *Fry*, to have this 100*l.* paid. The Master of the Rolls declared that the plaintiff could have no title but by grant

1 P. W. 445.

grant under the Exchequer seal, all the personal estate of *J. S.* being vested in the crown by the outlawry, and put off the cause in order that the plaintiff might get such grant, and make the Attorney-General a party. 2 P. W. 269. Bunb. 38.

Bill to establish a will and to perform several trusts, some of them relating to charities. The bill was brought by some of the trustees against other trustees, and several cestui que trusts. The Attorney-General need not be made a party; and a difference was taken where trustees of the charity are appointed by the donor, and where no trustees are appointed, but the lands devised immediately to charitable uses; in the latter case there can be no decree, unless the Attorney-General be made a party; but otherwise where trustees are appointed by the donor. Monill v. Lawson, Trin. 5 Geo. 4 Vin. 500. pl. 11.

Ancestors of plaintiff had a yearly rent of 10 marks issuing out of the manor of *Newport Pagnel* in the county of *Bucks*, and payable to them and their heirs; and this manor afterwards coming to the crown, upon a petition exhibited before *Hen.* 8. in his court of augmentation, it was decreed by the Court, upon advice had with the Justices of the Common Pleas, that the rent should be paid by the King, his heirs and successors, by the hands of his lord of the manor to the Receiver-General of the county, and now the manor being granted out of the crown to the defendant's father in fee, with a covenant to make an allowance to the patentee for that rent, or to the like effect; relief was prayed by the plaintiff against the patentee, and granted *per Curiam*, without making the Attorney-General a party. Hard. 181.

A mother of a bastard, by her will, gave all her personal estate to the bastard, and made *B.* and *C.* executors: mother died: bastard died intestate, without wife or issue; one of the executors brought a bill against the mother of her that was the mother of the bastard, and who had in her hands the bastard's portion, praying an account of the same. The defendant, the mother of the child's mother, demurred for want of parties, in regard the administrator of the bastard and the Attorney-General ought to have been brought before the Court. Lord Chancellor—The executor of the bastard's mother is entitled to the personal estate

estate of his testatrix; and though this may be in trust for the bastard, yet as the executor has a legal title, he can give a good discharge to defendant. Overruled demurrer.

3 P. W. 33.

4 Bro. 38.

Where a legacy was given to a charity, upon a bill for an account, it was held necessary to make the Attorney-General a party.

In a bill to establish a modus where the rector is an eleemosynary foundation, of which the King is visitor, the Attorney-General need not be made a party.

Anstr. 768.

Administrator.

Bill by plaintiff *Orlando Humphreys*, against his father Sir *William Humphreys*, for an account of the personal estate of Colonel *Lancashire* deceased, who by his will, gave 10,000 *l.* to his wife *Helen* and daughter *Helen*, and disposed of the surplus, one-third to his wife, and two-thirds to his daughter, and left his wife and brother executors; defendant married *Helen* the wife, plaintiff married *Helen* the daughter; defendant made a large settlement on the plaintiff his son on his marriage. Plaintiff falling out with his father, brings this bill for an account of Colonel *Lancashire*'s personal estate. At the time of filing the bill, *Helen*, the defendant's wife, was dead, and also the brother, who was executor of Colonel *Lancashire*, so that there was no executor or administrator of Colonel *Lancashire* before the Court, and therefore defendant demurred, and demurrer allowed.

3 P. W. 349.

There was an objection made for want of parties, for that the administrator of the husband was not made a party; but the wife being called administratrix in the bill, and having, by her answer, confessed that she had possessed the personal estate and disposed of it, and being the person by law entitled to administration, though she denied by her answer that she had taken out administration, the Court overruled the objection.

Prec. Ch. 64.

A person may be allowed to bring a bill as administrator, before administration actually taken out.

Barn. 320.

Bankrupt.

A bill being exhibited for discovery of bankrupt's estate, the defendant demurred thereto, because the bankrupt was not made a party. Demurrer allowed.

2 Vern. 32.

It is a general rule that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree: thus a residuary legatee need not be made a party; and for the same reason, in

in a bill brought by the creditors of a bankrupt against the assignees under the commission, the bankrupt himself need not be made a party; nor is it necessary now. 3 P. W. 311. in notis.

Where a bond-creditor brings a bill against an executor for an account of assets, and for satisfaction; it is no objection for want of parties, to say he has not brought other bond-creditors, or creditor of a superior nature before the Court, for any one bond-creditor may bring his bill, as the Court decrees only an account, and directs the executor to pay in a course of administration; and then the executor may before the Master set forth, as he is conusant of the estate and condition of testator, what debts are prior to the plaintiff's, which he is obliged to pay as having a legal preference. *Bond creditor.* 3 Atk. 572.

Admiral *Lestock* makes two instruments, one a deed by way of agreement between him and the defendant *Monk*, the other a will; by the deed he puts 4000*l.* into the hands of *Monk*, to pay to the Admiral himself for life, an annuity of 160*l.*; and afterwards, to pay 1000*l.* a-piece to *Peacock* and *Cockburn*, if they survived him; and an annuity of 100*l.* for life, to Mrs. *Knowles* his housekeeper, if she survived him; the residue to *Monk*, and if the annuity of 160*l.* be unpaid after any quarter-day, *Monk* shall repay the 4000*l.* to Mr. *Lestock* himself, to be placed out in the names of *Lestock* and *Monk*: by the will, he makes *Monk* executor and residuary legatee; after his death *Monk* made some payments, but discontinued them on notice of a bond-creditor, apprehending that there would not be sufficient to pay that and the others also; which occasioned the present bill by three persons claiming the benefit of the trust arising under the deed. Objection that they had not made the bond-creditor a party, who had also filed his bill. Lord Chancellor—The objection does not prevail, and if allowed, might make an inconvenient precedent. 1 Ves. 137.

J. S. late a Governor in the *East Indies*, bought 1000*l.* *South Sea* stock, and accepted it in the *South-Sea* books soon after he bought it. There was another *J. S.* owner of some *South-Sea* stock at same time, who went by the description of *J. S.* of *K.* *J. S.* of *K.* got the 1000*l.* of *J. S.* the Governor placed to his account in the *South-Sea* books, under the description of 1000*l.* *South-Sea* belonging to *J. S.* of *K.* In *Broker.*

1725, *J. S.* of *K.* transferred the 1000*l.* to his broker *B.* to sell it, which *B.* did; Governor *J. S.* died, when the fraud was discovered; *J. S.* Governor's widow demanded the 1000*l.* of *J. S.* of *K.* who was confounded and died the day after: bill by Governor's widow against administrator of *J. S.* of *K.*; and the *South-Sea* Company objected *B.* the broker should have been a party. Lord *Hardwicke* ruled not.

Barn. 324.

Cestui que trust.

A cestui que trust must in all cases be made a party, but the trustee needs not, especially if cestui que trust undertakes for him.

Prec. Ch. 275.

Bill by one trustee of stock against the other, to compel him to replace it or give security according to engagement, when the plaintiff joined in transferring the stock into his name; it is not necessary that the *cestui que trust* should be a party.

3 Ves. jun. 75.

Chancellor

The Chancellor himself may sue or be sued in equity, but he cannot make a decree in his own cause.

1 Eq. Ca. Abr. 71.

Churchwarden.

Churchwardens may join with a poor person, who is chargeable to the parish.

Ibid.

Co-lessee.

Plaintiff being co-lessee with *A.* brought his bill to have the rent apportioned on a partial eviction, and because the other lessee was neither plaintiff nor defendant (for if he refused to be a plaintiff he might be a defendant): the bill was dismissed with costs.

Strange 95.

Commissioners.

Bill against an officer under the commissioners for building the new churches improper. The commissioners only, and not the treasurer, ought to have been parties; for it is absurd to make the person who acts ministerially the sole party.

2 Atk. 144.

Corporation.

In a bill by the plaintiff against the *East India* Company, one of the officers of the Company was made a defendant, in order to discover some entries and orders in the books of the Company: demurrer, for that defendant was not charged with being interested in the matters in question, and that his answer could not be read against the Company, as the answer of one defendant could not be read against another. Demurrer overruled.

3 P. W. 310.

Anstr. 738.

A corporation may join in a suit to establish a claim on behalf of its individual members.

Dean and Chapter.

A bill was brought by a lessee for 21 years, under the Dean and Chapter of *Winchester*, against a lord of a manor and the tenant of a particular house, that it might be pulled down, as it obstructed the plaintiff's way

way to his fields, and to be quieted in the possession of the way for the future.—Objection for want of parties, because the Dean and Chapter of *Winchester*, who are the owners of the inheritance, are not brought before the Court; good. 2 Atk. 515.

Bill for the payment of money on bond, must be against all the obligors, or else there can be no decree. If a debt be joint and several, each of the debtors must be brought before the Court, because they are entitled to each others assistance in taking the account, and likewise to contribution, so on specialty debts, heirs and executors must both be made parties. Debtors. 2 Freeman. 127. 3 Atk. 406.

If *B.* has a joint demand against three factors, and *two of them are beyond sea*, he shall sue the other of them alone for the whole. *Factor.* 1 Vern. 140.

One binds himself and his heirs in a bond, and devises his lands to *J. S.*; the bill was brought upon the statute of 3 & 4 *William* and *Mary* to affect the real assets in the hands of the devisee; the heir of the devisor ought to be made a party to the suit, the statute saying, that an action of debt shall be brought against the heirs at law and such devisees jointly. *Heirs* 1 P. W. 99.

On specialty, heirs and executors must both be made parties. *Heirs and executors.* 3 Atk. 406.

Where an estate has been for some length of time quietly enjoyed under the will, it is not necessary to make the heir a party to a bill by creditors against the devisees; but generally where lands are devised to pay debts, if creditors bring a bill to compel a sale, the heir is to be made a party; otherwise in case of a trust created by deed to pay debts. 3 P. W. 91, 92.

Where there is only an equitable charge on a copyhold, and the legal estate descends to the heir, it is necessary to make the heir a party, otherwise the legal estate of the copyhold could not be conveyed to a purchasor.

But if the heir at law had, after the testator's death, conveyed away all the copyhold estate, then such grantee being capable of conveying to the purchasor, it might not be necessary to make the heir a party. *Vide* note in the foregoing case.

Heir at law need not be made a party to a bill brought by a devisee to redeem a mortgage, *unless he claims to have the will established.* Heir at law is a necessary party to a will by devisee, to have deeds delivered unto him. 2 Ves. 431. 1 Ves. jun. 276. 1 Ves. jun. 29.

Rep. in Ch. temp. Finch, 334.

If a person claims any thing due from the testator, the executor must be a party.

3 Ch. Rep. 92.

All executors must sue and be sued.

1 Ch. Ca. 277.

If a legatee of a term sues for it, he must make the executor a party, although he alledges he has his assent.

1 Vern. 31.

If the executor does actually release, yet he must be made a party to the suit.

1 Vern. 95.

Where plaintiff sued one executor, and alledged in his bill, that he did not know who the other executor was, and prayed the defendant might discover who he was and where he lived; adjudged no cause of demurrer.

1 *Salk.* 3.
9 Co. 37.
Hensloe's case.

Where there are several executors, and one only proved and the rest renounce, they must all be parties.

Where there is only a power and no estate devised to executors, there is no occasion to make them parties to a bill against the heir to compel a sale.

The bill was brought by the plaintiff, the widow of *Jacob Knight*, against defendant *John Knight*, as eldest son and heir of the said *Jacob Knight*, in order to compel him to rebuild and finish the plaintiff's jointure-house, and to make satisfaction for the damage she had sustained for want of the use thereof, and set forth a settlement, and that defendant's father had pulled down part of the plaintiff's jointure-house, that the defendant's father died leaving assets of great value; plaintiff had been obliged to hire another house to live in, for want of the jointure-house: the executor or administrator of plaintiff's late husband was not made a party, and a demurrer for that reason allowed.

3 P. W. 331.

In a bill brought by a mortgagee against the heir of a mortgagor to foreclose, the executor of the mortgagor need not be a party.—So note the diversity between the last case and this, for there the bill was to recover a satisfaction in damages, for want of repairs, *&c.* and there the personal estate is the natural fund for that purpose: but here the bill was not to recover the debt, but only to bar the equity of redemption.

3 P. W. 334. note (*a*).

2 Atk. 51.

A bill of discovery of real assets may be brought against an heir in order to preserve a debt, without making an administrator of the personal estate a party, where you suggest that the representation is contesting in the Ecclesiastical Court, and there a plea for want of parties would not be allowed.

A father, by his will, appoints an executor *durante minore ætate* of his daughter, and that she should be the executrix

executrix when she came of age: the daughter turned of twenty-one brought alone before the Court, though it appears in the cause, that the executor, *durante minore ætate*, had collected in the greatest part of the personal estate; he ought also to be a party. 2 Atk. 121.

An objection was made for want of parties upon the act of parliament of 3d *William* and *Mary*, *chap.* 13. against fraudulent devises, that the heir at law must be before the Court, and allowed. 2 Atk. 125.

Upon an information to apply money, given to a charity, to other uses than those specified by the will; where there is a residuary gift to trustees for other charitable uses, the trustees and the heir, though disinherited, are necessary parties. 2 Bro. 497.

Regularly husband and wife ought to join in a suit, but if a feme covert demands relief for a separate maintenance settled by the husband she may sue alone. *Husband and wife.* 1 Ch. Ca. 35.

If a bill be exhibited on behalf of a feme covert, upon her affidavit that it is brought without her consent, it will be dismissed. 1 Eq. Ca. Abr. 72. pl. 6.

A man having married an administratrix, the plaintiff obtains a decree against the husband and wife for 1500*l.* She dies. Question, whether the plaintiff can proceed against the husband without reviving against the administrator of the wife? The husband is not bound to answer it further than the value of the estate which he had with the wife. And the rule in equity is; where two or more are liable to a demand, you shall not proceed against one alone, but must bring all the persons liable before the Court. 2 Vern. 195.

A marriage settlement having been made of certain lands on the husband for life, remainder to the wife for life, with divers remaniders over; the present bill was brought by the husband in order to have the opinion of the Court, whether a certain parcel of land was intended to be included in that settlement? Objection that the wife was not made a party. Lord Chancellor allowed the objection, for he said, if the Court should be of opinion against the husband, such decree would not bind the wife, 1 Atk. 290.

J. S. by his marriage articles, reserves to himself a power to dispose of the lands therein mentioned (and which are settled in strict settlement) as he should think proper, in case he settled other lands of the value

of 100 *l. per annum* to the same uses; there is issue of the marriage, a daughter: *B.* without notice of this settlement, articled with *J. S.* for the purchase of these lands, but before the time for the completing the payment of the purchase-money, *B.* had notice of this settlement, and thereupon he refused to pay the residue. *J. S.* brought his bill in order to compel *B.* to complete his contract, suggesting that at the time this contract was entered into, he had settled other lands of the value of 100 *l. per annum* to the uses in the original settlement: at the hearing it was settled, that the wife and daughter ought to have been parties.

Barnard. 371.

Husband being abroad, wife may sue here alone: *feme covert* must answer alone, when the husband is not amenable.

Toth. 79.
Prec. Ch. 328.

Husband is more a formal party than any thing else, to a bill brought against the wife respecting her separate estate.

1 Ves. jun. 277.

Incumbrance.
Vin. Abr. tit. Party (B), ca. 51.

Estate charged with several incumbrances, one incumbrancer may sue without making the rest parties; at least it is cured by a decree directing an account to be taken of all the mortgages and incumbrances affecting the estate.

Where a settlement is set up, the mesne incumbrancers, and likewise the remainder-man, must be made parties.

Ibid. (B), 52.

In a bill by a second mortgagee to redeem the first, the mortgagor or his heirs must be before the Court.

2 Bro. 276.

The Court ordered a bill of foreclosure to stand over to make a judgment creditor, who was the only incumbrancer not before the Court, a party; but was disinclined to adopt, as a general rule, the usual practice of making all incumbrancers parties.

3 Ves. jun. 314.

Infant.

A bill may be brought on behalf of an infant *in ventre sa mere*, and an injunction obtained to stay waste.

2 Vern. 711.

Inheritance.

In a bill for execution of a trust by settling an estate on the several branches of a family, it is necessary to make the first entitled to the inheritance a party, if in being.

2 Ves. 492.

Bill to establish a custom whereby the owners and occupiers of certain lands in the parish of *Tort Baldwin*, in the county of *Oxford*, were obliged to keep a bull and boar for the use of the parishioners. It was objected at the hearing, that a custom which binds the inheritance

inheritance of the lands can never be eſtabliſhed in a court of equity, without the owners of the inheritance are made parties, as *Queen's College* (who were owners, *&c.*) ought to have been here: upon which objection the bill was diſmiſſed. Bunb. 181.

If a bill be brought againſt principal and one ſurety, and it is admitted that the other is dead insolvent, and there are no perſonal aſſets, his repreſentatives need not be made parties. *Insolvent party.* 3 Atk. 406.

Suit by one ſurety againſt another for contribution ſuppoſing that another ſurety is dead insolvent, his executors ought to be parties. Finch, 15.

An insolvent debtor is not a neceſſary party to a bill by a purchaſer of his intereſt in ſtock, againſt his assignee. 3 Bro. 228.

In a ſuit in equity, all who have a joint intereſt in the thing demanded ought to join. But two perſons cannot join in the ſame bill to have relief in ſeveral reſpects, So the King and the Queen Dowager cannot join to have a recompence for a covenant broken by waſte, *&c.* where the King has the inheritance, and the defendant claims under the leſſee of the Queen, who had a grant for her life. *King and Queen.* Hard. 219.

The King may ſue in Chancery. 1 Eq. Ca. Abr. 71.

All bodies politic and corporate, and all perſons of full age, not being femes covert or lunatick, are by themſelves capable of exhibiting a bill of complaint in the Court of Chancery, excepting only the King and Queen, who ſue by their Attorneys General; the Queen conſort may ſue alone, ſo may a Queen Dowager, though married. 2 Inſt. 50. Co. Litt. 133.

If a bill is brought to eſtabliſh a general modus through a whole pariſh, all the land-owners muſt either be plaintiffs or defendants; but if the perſon ſues for tythes in kind, defendant may inſiſt on ſuch a modus, though the reſt of the pariſhioners are not made parties. *Land-owners.* MS. Rep.

One owner of lands in a townſhip may ſue for himſelf and the other land-owners to eſtabliſh a contributory modus. Anſtr. 768.

It is not neceſſary to make one joint owner a party to a bill againſt a factor, reſpecting the moiety belonging to the other joint owner. 1 Ves. jun. 417.

Bill being to have an account of a truſt, the defendant pleaded that he was intruſted for three children, *viz.* *Legatees and reſiduary legatees.*

for the plaintiff and his two brothers, and that the other two not being parties to the suit, he was not bound to answer; for otherwise he might be thrice called to an account for the same matter, and the plea was allowed.

1 Vern. 110.

But if *A.* devises several legacies to *B. C. D.* and that if his estate fall short, each to abate in proportion, and if it increase, each legacy to increase in proportion; in this case one alone may sue for his legacy, and it is not necessary that the other legatees should be made parties. Though one legatee may sue; yet if the residue of the personal estate be devised to three; *quære* whether one of them may sue alone for his part?

2 Ch. Ca. 124.

Nel. Ch. Rep. 243.

Bill by some of the residuary devisees, on behalf of themselves and the other devisees, all the residuary devisees must be parties.

3 Bro. 365.

A residuary legatee must be a party to a bill for a specifick legacy.

1 Ves. jun. 313.

Lessee.

If there are two lessees and one brings a bill for apportionment of rent, the other must join as plaintiff or be made defendant, or the bill will be dismissed with costs; but without prejudice.

Stra. 95.
1 P. W. 428.

In this case it appeared that *Houghton* was lessee and had assigned over his lease to others, in trust for such as should buy shares in a certain water-pipe. *Houghton* became insolvent, and the rent in arrear. Bill filed against the assignees of the lease and several who had bought shares, to have the arrear of rent paid, and the growing rent, and the performance of the covenants in the lease. Objection that the plaintiffs had not proper parties, for *Houghton*, the lessee who had assigned over, was liable and no party, and the plaintiffs had not all the owners of shares that ought to contribute to the rent before the Court: the first part of the objection was allowed, that *Houghton* ought to be a party; but as to the latter part, that all the sharers were not parties, was disallowed; the assignees, by dividing it into so many shares, had made it impracticable to have them all before the Court.

2 Vern. 422.

Lord of the manor.

Vin. Abr. tit. Cop. (X e.) pl. 5.

Where a bill is brought for surrender of a copyhold estate for lives the lord must be a party, because when the surrender is made, the estate is in the lord, and he is under no obligation to new grant it.—*Contra* in the case of copyholders of inheritance, there the lord needs not be a party.

A bill

A bill was dismissed because the tenants were only parties and not the lord, they having attorned to a new title against their first lessor. Vin. Abr. tit. Party (B), p. 254. ca. 46.

If a lunatick be not named a party in the bill or information, it is good cause of demurrer. *Lunatick.* 1 Ch. Ca. 153.

Demurrer to bill because lunatick was not a party, and allowed; Lord Keeper declaring it was necessary to make lunatick a party, as an infant, where a suit was on his behalf; but in case of an idiot otherwise, lunatick may recover, and then he is to have his estate again.

That where committees of a lunatick sue for any thing in the right of a lunatick, in such case the committee, as well as the lunatick, are made parties. *Vide* note in this case. 1 Ch. Ca. 19.

In a suit in equity, all who have a joint interest in a thing demanded, ought to join; but two persons cannot join in the same bill, to have relief in several respects. *Joint interest.* Hard. 219.

If two or more have a joint interest, regularly they must be all parties to the bill; so if two or more are liable to a demand, you cannot proceed against one alone. 2 Vern. 195.

So all executors, trustees, or their representatives, are to be made parties; but this rule may be dispensed with, if any of them are not amenable, or if they have stood out process to sequestration; but in case of a charity it is not necessary that all the tertenants should be made parties, for the charity shall not be put to that difficulty; but the tertenants may, if they seek a contribution, undertake to make them parties to the information, or help themselves by such course as they shall think fit. 1 Salk. 963.

In a bill to foreclose the case was, *A.* made a mortgage for a term of 500 years for securing 350*l.* and interest to *B.*, who so long since as 1705, assigned the term to *C.* redeemable by himself on the payment of 300*l.*; *B.* died, *C.* brought a bill against *A.* to redeem, or be foreclosed; and though but a derivative mortgagee, yet he did not make the representatives of *B.* the original mortgagee parties, which he ought to have done. *Mortgagee.* 2 P. W. 643.

Where a mortgagee assigns without mortgagor's joining, the heir of the mortgagor, on preferring a bill to redeem, has no occasion to bring the original mortgagee

mortgagee before the Court, for the assignee, as standing in his place, will be decreed to convey.

2 Atk. 39.

Obligor.

If a bill is against the executor of the obligor for discovery of assets, all the obligees shall be parties, for the charge ought to be equal; so, if one obligor is sued, all ought to be joined, though the others are only sureties; but if there is a judgment against one obligor, his executor may be sued for a discovery of assets, without the other obligors; for the bond is extinguished by the judgment.

2 Vent. 384.

2 Freem. 127.

In the present case there were three obligors in a bond; the plaintiff, the obligee, has brought only one obligor before the Court, and the representative of another, but not of the third, because the bill states that he is dead insolvent: no occasion to make him a party.

3 Atk. 406.

Obligee.

A., *B.*, and *C.* were bound jointly and severally in a bond to *J. S.* *C.* dies; *J. S.* brings a bill against the executors of *C.* for discovery of personal estate, and for an account thereof, and to be paid out of assets; the other obligors need not be parties.

2 P. W. 313.

Lord Chancellor—It is not necessary, in every case of assignments, where all the equitable interest is assigned over, to make the person who has the legal interest a party; but if an obligee has assigned over a bond, and a presumption of its being satisfied arises from the great length of time as in the present case, where the bond was given by Sir *James Harrington*'s father in 1709, and assigned over in 1717, and no demand has been made in 22 years, till the bringing of this bill in 1739, by the assignee; the representative of the obligee should be a party.

2 Atk. 235.

The representative of the obligee, who was dead, ought to be a party in a bill for a *ne exeat regno* against the obligor.

3 Bro. 25.

Occupiers of land and landowners.

Decree in time of *Charles* I. for payment of 40 *l. per annum* out of particular lands, formerly part of the forest of *Bladen*, to the vicar in the county of *Wilts* in lieu of tythes, a bill being brought against the landowners to establish a right to this 40 *l. per annum*; not necessary that the occupiers, as well as landowners should be made parties to the bill.

Gilb. Rep. 230.

Outlaw.

A. having outlawed *B.* brings a bill against *B.* and *C.* a trustee for *B.* with respect to an annuity, to subject this annuity to the plaintiff's debt, the Attorney-General

General ought to be made a party, and the plaintiff must get a lease or grant in the Court of Exchequer from the crown. 1 Will. 445.

The bill was brought for an account and for the delivery of a strong box, which was in the custody of the defendant, and in which were found jewels, and a note in these words, "Jewels belonging to the "Duke of *Devonshire* in the hands of Mr. *Saville*," whose representative the plaintiff was, and in whose possession they had been ever since the year 1695 to the year 1745: not necessary that the Duke's representative should have been a party. Pawner. 1 Vez. 101.

There ought to be proper parties to the bill; but if a proper party is beyond sea, upon an affidavit that it is not known whether he be dead or alive, the plaintiff shall have a decree against the other defendants without prejudice. *Party beyond sea.* 1 Vern. 487.

Plaintiff being residuary legatee, brought his bill against the defendant, who was one of the executors, without his co-executor who was beyond sea, to have an account of his own receipts and payments. The defendant insisted that his co-executor ought to be made a party; but the Lord Chancellor ordered the cause to go on, and said, that if any thing appeared difficult in the account, the Court would take care of it. Prec. Ch. 83.

In this case it was admitted, that if there are three joint factors, and a man has a demand against them jointly, a bill against one of them for the whole duty shall be good; *quære* if it be not where the other factors are beyond sea? 1 Vern. 140.

Plaintiff's father who was the executor in trust, being gone to the *Indies* as a common soldier in the service of the *East India* Company, and plaintiff making affidavit of that matter, and that he did not know whether his father was living or dead, nor where to find him to serve him with process, it was upon a motion ordered that the plaintiff might proceed against the said defendants, without prejudice for not bringing his father. 1 Vern. 487.

Cause permitted to be heard without a necessary party, he being beyond sea. Bunb. 209.

A. stated by books in evidence for defendant to be a merchant *abroad*, and one witness swearing he knew him late a merchant *abroad*, and no evidence of his return, 1 Vez. jun. 417.

return, he was sufficiently proved out of the jurisdiction, and defendant was precluded objecting that he was not a party.

Parties to a vestry-order.

Upon a bill in equity to be relieved, and to recover the payment of 100*l.* a-year agreed to be paid the plaintiff, by a vestry order made by the defendants and others, the parishioners of *St. Botolph's, Bishopsgate*, for a yearly lecture in the parish; the parties to the order are necessary parties to the suit.

Hard. Rep. 333.

Parties to supplemental bill.

A bill charges forgery in a lease, and prays to be relieved against that, but by way of inducement only mentions there were fraudulent circumstances attending this case, without making it a distinct charge from the forgery, or bringing the trustees who were parties to the lease, and to whom the fraud is imputed, before the Court, and for want of this, the defendant's counsel objected to the plaintiff's going on with the cause. *Lord Hardwicke said*, As there had been already a decretal order, and an issue to try the forgery, and brought on now upon the equity reserved, the only method to assist this case was, to let the cause stand over, and to allow the plaintiff, on paying the costs of the day, to bring a supplemental bill, in which he may charge the fraud, and make the trustees parties.

3 Atk. 110.

If the objection by the defendants in the original cause, for want of parties to the supplemental, is not made in the first instance, it is too late to do it when the cause comes on again, where it was put off only for want of formal parties, in order that the decree might be complete.

3 Atk. 217.

Party not appearing after process.

Objection by defendant, that *J. S.*, who was a necessary defendant, was not brought to a hearing. Plaintiff shewed they had prosecuted him to a sequestration, and therefore might go on. Answered by defendant, that the affidavit on which the process of sequestration was founded was insufficient, and upon reading it, it appeared that the subpœna was left at a place where *J. S.* had only lodged once, and that above two years before the service. *Per Curiam*, not sufficient service to go on against the other defendants alone, unless the plaintiff would consent to stand in the place of *J. S.* to all purposes, which he not doing, the cause went off for want of parties.

Prec. Ch. 99.

Partner.

The widow or representative of *Newland*, brought a bill for an account against Sir *George Champion*, the surviving

surviving partner of her husband; her brother, who was a creditor of her late husband for 1000 *l.*, also brought a bill against Sir *George Champion* for an account.—These two causes were brought on together, and it was insisted that the second bill ought to be dismissed, for it would multiply suits, if every creditor might not only bring his bill against the personal representative of the debtor, but also against every debtor of that debtor. Lord Chancellor—The general rules are plain, that a creditor of the testator or intestate need not make any body but the personal representative a party. At the same time in this court, if there are any persons who have possessed the estate, or any debtors of the deceased, and any collusion between them and the representative, they may here make them parties, and demand an account against them; and decreed an account between the plaintiff in the second cause and Sir *George Champion*. 1 Ves. 405.

Plaintiff at law.

The bill was to be relieved against a bail-bond, setting forth that the defendant, the sheriff, by a fraudulent practice, had been prevailed upon to return a *cepi corpus* a year after the defendant in the action at law was dead; and though he was not amerced for not having the body at the day, yet had, by a combination with the plaintiff at law, assigned this bond, and now a suit was commenced at law in the defendant's name: all which was fully made out by proof: yet, forasmuch as the plaintiff in the action at law, to whom and for whose benefit the bond was assigned, was not made a party, his Honor refused to relieve the plaintiff in this case. 1 Vern. 87.

Performance of a covenant. 2 Vern. 36.

Upon a bill for specific performance of a covenant under hand and seal with *A.* for benefit of *B.*, *A.* must be a party to the suit.

Proprietors of an undertaking.

Bill was brought by the treasurer and manager of the *Temple Mills Brass Work*, in behalf of themselves and all others proprietors and partners in the same undertaking (except the defendants, who were the late manager and treasurer) to call them to an account touching the partnership: defendants demurred, for that all the rest of the proprietors were not made parties: demurrer overruled. Prec. Ch. 592.

Remainder-man. Eq. Ca. Abr. 2 vol. 166.

A remainder-man expectant on an estate-tail, need not be made a party to a bill, one end of which is to impeach a settlement, because such remainder-man is not regarded in equity, neither can he be bound.

If

If a remainder-man in tail brings a bill against tenants for life to have the title deeds brought into court; and there are annuities on the reversion, and others who have an interest under the trust term, they must be parties.

3 Atk. 571.

Tenant in tail.

Lord Chancellor—Where a mortgagee has a plain redeemable interest, and makes several conveyances upon trust, in order to entangle the affair and to render it difficult for a mortgagor or his representatives to redeem, there it is not necessary that the plaintiff should trace out all the persons who have interest in such trust, to make them parties: but where the redemption depends upon equitable circumstances, and the plaintiff is not in the common case of redemptions, and where the mortgagee in fee has made an absolute conveyance, with several limitations and remainders over, the decree cannot be complete without bringing at least the first tenant in tail before the Court.

2 Atk. 237.

Trustees and cestui que trust.

Vin. Abr. tit. Party (B), pl. 71.

In directing an issue, a bare trustee ought not to be a party, for that might hinder his being an evidence.

Where a real estate is in the hands of a trustee, and the trustee conveys it over to another who has no notice of the trust; if the bill is brought by cestui que trust, trustee must be made a defendant.

Barnard. 325.

Vendor.

If an ancestor has agreed for purchase of particular lands, and dies before it be completed, and the heir at law brings a bill against the devisees, who claim under the ancestor's will made before the purchase, the vendor must be a party if his title be doubtful; otherwise if it is clear.

1 Atk. 572.

Vicar.

Bill by plaintiffs as lessees of the rector of *Winterbourne*, for a portion of great and small tythes in *Stoke Gifford*, being a neighbouring parish. The tenants and the lay-impropriator who claimed the great tythes in *Stoke Gifford* were made parties; but because the vicar of *Stoke Gifford*, who might be entitled to the small tythes, was not made a party, the bill was ordered to be dismissed; but, upon application, stood over with liberty to amend.

Bunb. 115.

Bill by vicar, against defendant who was sequestrator, for an account of the profits received during the vacation: it was objected that the bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives; by the statute 28 *Hen.* 8.

Court

Court thought the bishop should have been a party; but by consent, the cause was referred to the bishop of the diocese:—*Nota*, It was said a sequestrator could not alone bring a bill for the tythes. Bunb. 192.

The representative of the undertakers for briefs, who are dead, need not be brought before the Court, for they are each answerable the one for the other, and are to be considered as one body. *Undertakers for briefs.* 2 Atk. 162. Barnard. 423.

PAUPERS.

[SUITS are commonly prosecuted with charge; but if the complainant or the defendant is not worth 5 *l.*, the Court will, either before or after commencement of the suit, admit him to sue, prosecute or defend, without charge *in forma pauperis*; though sometime heretofore, the Court hath refus'd to admit the plaintiff after suit began, without special cause.] Cl. Tut. 9.

[It hath been complained of, that both plaintiff and defendant have been admitted *in forma pauperis* in the same cause, as tending much to the disquiet and trouble of the Court.]

[The way for either party to obtain the admission is, first, for the party to make an affidavit before a Master, that he is not worth five pounds; then to draw a petition to the Lord Chancellor or Master of the Rolls to be admitted, to have a counsel and clerk assigned him, naming whom in the petition.]

[If the complainant petitions, he must at the bottom of his petition have a certificate under the hands of two counsel, signifying they conceive he has good cause of suit, except the bill be already filed; and then, as said, he needs no certificate.]

[This being done, and the affidavit annexed to the petition, he presents the same; and if there appear no cause against it, my Lord Chancellor, or the Master of the Rolls, underwrites an order according to the petition.]

[Said, the defendant needs no certificate.]

[After admittance, no fee, profit, or reward, shall be taken of the *pauper* by any counsel or attorney for dispatch of his business while it depends in court, and he continues a *pauper*; nor any contract or agreement

ment be made for any recompence or reward afterwards.]

[If they offend herein, they are to undergo the displeasure of the Court, and such punishment as the Court shall think fit to inflict; and for the *pauper*'s offence herein, he shall be dispaupered, and never admitted again in the same suit *in forma pauperis*.]

Or. Ch. 124.

[*Note*, Though the clerks take no fees strictly so called, of a *pauper*, yet they make him pay for the labour of writing, which is after the rate of a penny *per* sheet; and this is said to have been allowed by the Lord Keeper, in 1628.]

[If it be made appear to the Court any *pauper* has sold or contracted for the benefit of his suit, or any part thereof, while the same depends, such cause shall be thenceforth totally dismissed the Court, and never again retained.]

Ibidem.

[The counsel or attorney assigned to assist a *pauper*, either to prosecute or defend, may not refuse so to do, except he satisfy my Lord or the Master (which ever ordered the admission) with some good reason for such refusal.]

Ibidem.

[The counsel, who moves for a *pauper*, ought to have the order of admittance with him, and to move for him before he makes any other motion.]

Ibidem.

[And that hinders not, but that he may have another motion, or as many as he might have without it.]

[If the Register finds that any for whom a counsel moves as a *pauper*, was not admitted *in forma pauperis*, he shall not draw up the second motion of such counsel; but the fruit of it shall be lost for his abuse to the Court in the other.]

Or. Ch. 125.

[No process of contempt at a *pauper*'s suit shall be sent to be sealed till signed by his six clerk, who is to take care it be not vexatious or needless.]

Ibidem.

[All Masters, Counsellors, Officers, Ministers, Clerks, and Solicitors, in the court, are to observe these rules in favour of *paupers*.]

Ibidem.

[The admission must always be produced in the office where the *pauper* hath occasion to pass.]

Com. Att. 444.

[As a party may be admitted *in forma pauperis* at any time during the suit; so if at any time it is made appear to the Court, that he is of such ability, that he ought not to be *in forma pauperis*, the Court will dispauper him.]

[Therefore, where it was shewed the Court that a *pauper* was in possession of the land in question, the Court ordered him to be dispaupered, though the defendant had a verdict at law, and might take a writ of possession.]

Where the plaintiff a pauper, had a decree for the duty and costs; the Master taxes costs as usual for persons not paupers: on motion the Court ordered the plaintiff and his solicitor to make oath before a Master, of what they had paid, or were to pay, and that to be allowed, but no further. Costs. Prec. Ch. 219.

A plaintiff suing *in formâ pauperis*, shall not amend by leaving out defendants, without paying their costs. Amendment. Costs. 2 Bro. 22.

The affidavit to ground the order to sue *in formâ pauperis*, must be by the party, and not by a third person. Affidavit. 2 Bro. 22.

A pauper shall not dismiss his bill without costs. *Costs.* 3 Bro. 87.

Nor by getting himself admitted a *pauper*, can he be discharged of the costs he was liable to precedent to the admission. Moseley 58.

PETITION

[IS a person's request in writing, directed to the Lord Chancellor or Master of the Rolls, shewing some matter or cause whereupon he prays somewhat to be granted, or done for him.] What.

[Most things which may be moved for of course, may be petitioned for; as a commission to answer, or plead and demur.] For what purposes.

[For the Lord Chancellor's letter to a nobleman to appear, and answer a bill, &c.]

[That the cause may be heard.]

[For a re-hearing.]

[For an appeal, &c.]

[Or to have a mistake amended in a caption, &c.]

[Or for favour; as to have time enlarged for answering.]

[For publication.]

[To hasten joining in commission, &c.]

[For paying money.]

[To have a hardship removed; as, that process of contempt may be stayed, and that the defendant may have a copy of the bill, where there being many de-

fendants, who employ ſeveral clerks, the clerk of one of the defendants cannot get him a copy of it, whereby proceſs of contempt is iſſued out againſt him for not anſwering.]

Upon what occaſions.

[Sometimes a petition precedes a ſuit; as a perſon to be admitted *in formâ pauperis*.]

[Sometimes it is upon a collateral matter only; as it has relation to ſome precedent ſuit, or to an officer of the Court, as to have a clerk or ſolicitor's bill taxed, or to oblige him to deliver up papers, *&c.*]

Order.

[No former order made in court is to be altered, croſſed, or explained, upon any petition; but ſuch orders may be only ſtayed upon it for a ſmall time, till the matter may be moved in court.]

Commiſſions.

[No commiſſions for examination of witneſſes ſhall be diſcharged, nor ſhall any examinations or depoſitions of witneſſes be ſuppreſſed, upon petition, unleſs the matter be firſt referred, and certificate had thereupon.]

Re-hearings. [Toth. 34.]

[The Maſter of the Rolls is not to be petitioned for re-hearings, but the Chancellor.]

Pleas, &c.

[Said alſo, the Chancellor only is to be petitioned touching pleas, demurrers, or exceptions, or touching decrees or ſpecial orders made before the Chancellor.]

[In moſt other caſes of petition, the Maſter of the Rolls may be applied to.]

Of courſe.

[Petitions are delivered out of court; and if it be for a matter of courſe, as to be admitted *in formâ pauperis*, or ſuch like, it is forthwith granted and ſigned. If it be for any thing which requires examination, or that the adverſe party be heard, then it is commonly ordered that all parties attend the next day of petitions, or general ſeal; at which day the matter is debated, and ordered as the Court ſees cauſe. Affidavits are in ſuch caſe often neceſſary to inform the Court how matters ſtand on each ſide.]

Petition out of term.

[If there be occaſion to petition out of term and general ſeals too, and the matter is of conſequence and requires diſpatch, a petition may be delivered, and the parties will be ordered to attend the Lord Chancellor or Maſter of the Rolls at a time therein appointed, and have juſtice done them; for this Court is always open.]

Stamps.

[A petition (even to be admitted *in formâ pauperis*) muſt now be on double ſixpenny ſtamps.]

[An

[An order upon a petition for attending and hearing the matter must be drawn up, passed, and served as other orders, and a copy of the petition is also to be delivered the party served.] Order, how drawn.

[In 1647 there was an order made, that no officer should issue a *subpœna*, attachment, or other process, nor proceed or admit of any proceedings in any cause depending in this court, upon a petition signed by the Lords Commissioners, or the Master of the Rolls, until the petition were first filed with the Register, and an order drawn and entered thereupon.] Petitions filed.

[All process and proceeding otherwise issued, and had thereupon, should be null and void, and not bind the adverse party.] [Or. Ch. 43.]

[In 1687 it was ordered, that no order made upon any petition (unless the same be by way of summons) should be of any effect to ground *subpœna* or other process upon, unless within three days in term time, or a week in the vacation, after the same should be granted, an order were drawn and entered up with the Register on such petition, to the end no person might be surprised with any private order.] Entered with the Register. [Or. Ch. 174.]

[No injunction for stay of suits at law shall be granted, revived, dissolved, or stayed, upon petition.] Injunction.

[Nor shall an injunction of any other nature pass by order upon petition, without notice and a copy of the petition first given the other side: the petition to be filed with the Register, and the order entered.] [Or. Ch. 123.]

[No sequestration, dismission, retainer upon dismission, or small order is granted on petition.] Sequestration. [Ib. Toth. 34.]

[No former order made in court is to be altered, crossed, or explained, upon petition; nor the commitment of any person taken upon process of contempt to be discharged, but upon hearing the adverse party, his attorney, or clerk, towards the cause.] Adverse party heard. [Ibid. Or. Ch.]

[Said in court, where a matter comes in by petition, and the other side would discharge the order, or have any thing relating to the matter, he ought regularly to do it by petition; though the Court will sometimes grant it upon motion.] Order, how discharged.

A decree, much more an interlocutory order, if gained by collusion, may be set aside on petition. *contra.* Decree. 3 P. W. 111. 3 Bro. 74.

The delivering over the body of a ward, or possession of a trust estate, cannot be awarded on petition, but a bill must be brought for that purpose. When petition proper. 3 P. W. 154.

Lunatic. Timber on a lunatic's estate was cut and sold under an order of Court, and the produce paid into the Bank; on *petition*, the Court refused to give the produce either to the heir or next of kin, without a bill.

1 Ves. jun. 453.

Deeds. Deeds not delivered up upon petition in bankruptcy.

1 Ves. jun. 160.

PLEA,

VIDE

Commission to answer.
Baron and Feme.
Bill of Review.
Dismission.

What. [IS a special answer to a bill, or some part thereof, shewing and relying upon one or more things as cause, why the suit should be either dismissed, delayed, or barred.]

The defence proper for a plea must be such as reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit. The end of a plea is to save to the parties the expence of an examination of witnesses at large; and therefore it is not every good defence in equity that is good as a plea. For where the defence consists of a variety of circumstances, there is no use of a plea; as the examination must still be at large, and the effect of allowing such a plea will be, that the Court will give judgment on the circumstances of the case before they are made out by proof,

1 Atk. 94.

[It is of three sorts:]

[1. To the jurisdiction.]

[2. To the person.]

[3. In bar.]

In disability of the person. Oath. [Pleas in disability of the person, or to the jurisdiction, need not be upon oath; and so that they be under counsel's hand, they shall be received and filed, though the defendant do not deliver the same in person, or by commission.]

Or. Ch. 96.

Com. Ats. 429. Pr. Ch. 18. [Pleas of any matter of record, or of matters recorded in this court, need not be upon oath.]

[But

[But pleas in bar of matters *in pais* are to be upon oath: and except the matter of the bar be single, and so full a bar as that the bill requires no further answer, the whole matter is generally set forth by way of answer; and then so much of it as goes in bar, is relied upon by way of plea; and this is intituled "The plea "and answer of the defendant." Or the defendant may plead the matter proper in bar, and then add by way of answer what further is necessary in point of fraud, *&c.* charged.] Pleas in bar. [2 Ch. Ca. 161.]

[An answer and plea taken by commission was returned *ista respons' capta fuit per sacramentum*, &c.] Oath.

[So that the plea not appearing to be upon oath, it was rejected, but without costs; the Court apprehending it to be rather the mistake of the commissioners, than the fault of the defendant.] [2 Ch. Ca. 208.]

[After an attachment with proclamation returned, no commission to answer is to be made, nor demurrer to be admitted, but upon motion in open court.] Attachment returned. [Or. Ch. 99.]

[So neither is a plea in such case to be admitted without like motion.] Ibid.

[In the *first* sort of pleas is to be shewn that the Court has no jurisdiction of the cause; as if lands lie in a county palatine or exempt franchise, you may plead it, and that time immemorial, *&c.* (or as the case is,) all suits at common law and in equity, touching the same, have, or ought to have, been impleaded, and yet are impleadable in the courts of the said county palatine, *&c.* before the Chancellor, *&c.* and not elsewhere.] Plea to the jurisdiction. Finch, 451.

[In a plea of the privilege of the university of *Oxford*, the privilege must be pleaded under seal of the university.] [2 Ca. Rep. 104.]

[Said, if a bill be brought in the Exchequer touching tythes, or other matter, and the defendant exhibits his bill here against the there complainant, touching the same matter, the Court of Exchequer has gained the jurisdiction by priority of suit, and it may be pleaded in abatement of the bill here.] Exchequer.

[One plea only is to be admitted to the jurisdiction; wherefore if the defendant plead such plea as is not sufficient in its nature, or plead the matter insufficiently, he will be put to answer.] One plea only to the jurisdiction.

[As pleas to the substance and body of the matter, so pleas to the jurisdiction, shall be determined in open court.] How determined. [Pr. Alm. 43.]

In respect of the person.

[In the *second*, *viz.* in respect of the person, it may be shewn either that the plaintiff is by law disabled to sue, as that he is outlawed, or excommunicated, (which works a temporary disability,) or that he is attainted, *&c.* (which is a perpetual disability); that he is a papist convict, or that the plaintiff or defendant is not such a person as alledged, as feme sole, heir, executor, or administrator, *&c.* and is not therefore to sue or be sued, as such for the matter in question.

[*Note*, If a feme sole plaintiff marry after answer, and pending the suit, upon shewing it to the Court the suit shall abate, but may be revived by bill.]

[But if a feme covert exhibit a bill in her own name only, it may ordinarily be pleaded in abatement, and the bill will be dismissed. *Vide Baron and Feme.*]

[Ca. Rep. 139.]

[Ibid.]

[A feme sole sued a *subpœna*, and the same day married; the suit dismissed with costs.]

[If an administrator, having administration only in the province of *York*, sues a defendant here, who lives in the province of *Canterbury*, for a debt which arose in this province, he may plead in disability of the plaintiff.]

Outlawry.

[If outlawry is pleaded, the record or the *capias* thereupon must be pleaded *sub pede sigilli*, and is usually annexed to the plea.]

[The defendant may plead and shew as many outlawries as he can.]

Cl. Tut. 21.
1 Vern. 184.

[Outlawry in a plaintiff, executor or administrator, is no good plea; for they sue in *auter droit*.]

[If the outlawry pleaded be in a suit for that very duty or thing, for which relief is sought by the bill, the plea will of course be disallowed, and the plaintiff shall have a *subpœna* against the defendant, for five marks costs (now five pounds), and to make a better answer.]

[Or. Ch. 98.]

Setting down the plea.

[If a plaintiff think a plea of outlawry insufficient through mispleading, or otherwise, he may, upon notice to the clerk on the other side, set it down with the Register for the judgment of the Court: but if, within eight days after filing the plea, the plaintiff do not so enter it with the Register, the defendant may take out process for five marks costs (now five pounds) as if the plea had been argued; for the defendant is

not

not bound to set it down, seeing it is a matter pleaded under seal. [Or. Ch 98. Pr. Alm. 12.]

[After the outlawry is reversed, the defendant, on a new *subpœna* served on him and twenty shillings costs paid him, shall answer the bill.] [Or. Ch. 98.]

[So the defendant may plead excommunication in the plaintiff, which must be certified by the ordinary, either by letters patent containing a positive affirmation, that the complainant stands excommunicated, and for what; or by letters testimonial, reciting *quod scrutatis regesteriis invenitur*, &c. and either of them must be *sub sigillo*, and so pleaded.] Plea of excommunication.

[Upon producing letters of absolution here in court, *&c.* the plaintiff will be allowed to proceed.] [Pr.H.Ch. 164.]

[Outlawry or excommengement in a *prochein amy* or guardian cannot be pleaded or alledged in disability, where an infant sues or defends by him: *causa qua supra.*] Outlawry. Excommunication. [Cl. Tut. 13.]

Outlawry in the relator in an information is not a good plea. *Vide Prec. Ch.* 13. *contra.* Mitf. 187.

But excommunication is a good plea to a bill brought by an executor or administrator, though they sue in *auter droit.* Co. Lit. 134. Bac. Ab. 36.

Plea of outlawry overruled because it was not put in upon oath. *Vide* 2 *Vern.* 198. Oath. 2 Vern. 37.

[If one sue as administrator, the defendant cannot plead that another is executor by a nuncupative will before the executor has probate of such will.] Administrator. [1 Ch. Ca. 192.]

[There so rarely is occasion for the pleas of *alien enemy* or *attainder*, that little needs be said about them. Only it may be observed, that where an alien enemy is come here for refuge and protection, or has lived here peaceably a long time, the Court will probably discountenance such pleas against him.] Alien enemy. Attainder.

[Heretofore, where a bill was exhibited against *J. S.* supervisor of the will of *J. N.*, and one *J. S.* who was no supervisor of *J. N.*'s will, being served with process, alledged that *J. S.* the supervisor was dead; it was ordered, the defendant should put in his allegations upon oath, by way of answer, and then desire judgment, whether he should be compelled to answer the bill, and pray his costs for the unjust vexation.] Allegations by way of answer. [1 Ch. Rep. 37.]

[A plea in bar is commonly where some foreign matter or thing is shewed, whereby, supposing the bill, *&c.* true, yet the suit or bill, or some part thereof, is barred.] Plea in bar.

[Sometimes it is an act of parliament; as the statute of limitation of actions, the statute of frauds, &c.]

[Sometimes a record; as, a common recovery, a verdict at law, a verdict and judgment, &c.]

[Sometimes both a statute and record; as a fine with proclamation according to the statute, and five years nonclaim.]

[Sometimes it is a matter *in pais*; as a release, an account stated; notwithstanding which a defendant must ordinarily answer a particular fraud, &c. if any be alledged.]

[If the defendant's title be paramount the plaintiff's, he may plead it in bar.]

[So if the plaintiff has granted or released his right to the defendant.]

[So a lease, or a purchase for a valuable consideration, &c. may be pleaded in bar; the defendant by way of answer denying any notice of the plaintiff's title or claim.]

[So a long peaceable possession, as 60 years or more, may be pleaded in bar.]

[Sometimes this plea is to the very ground and foundation of the suit; as in a bill for discovery of title, &c. the defendant may plead, that the complainant has conveyed the premises in question, or his right to them, &c. to another person.]

[All or several of the matters in bar may be pleaded together.]

[Sometimes a suit depending here or elsewhere is pleaded in bar.]

[So a decree or dismission in this court.]

[If a decree is had, and the party brings a bill intending to review the decree, but does it by way of original bill, and not in form of a bill of review, the defendant may plead the decree in bar.]

[A decree and dismission in the Court of Exchequer was pleaded here; but the plea was overruled, and the defendant put to answer, by advice of the Judges.] [1 Pz. Alm. 22.]

Fraud. [Where there are matters alledged in the bill, to which the bar reaches not, or some circumstance relating to the matter in bar, that requires a particular answer, as fraud, &c. the defendant must answer on oath as to these.]

Answer. [If the defendant is doubtful whether, if he plead the matter of his defence, his plea will be allowed good by

by the Court; he may shew the whole matter by answer, and then insist and rely upon it almost as if he had pleaded it, only he is not to call it a plea, nor to have the benefit thereof till hearing.]

[A plea of a former suit depending here for the same matter, need not be set down with the Register, being a matter recorded in this court: but if the plaintiff be not satisfied with the plea, it shall be referred to a Master to certify the truth thereof; and if it be determined against the plaintiff, he shall pay the defendant five pounds costs.] Where plea must be set down with the Register. Former suit. [Or. Ch. 98.]

To a bill brought against defendant as an executor to account, he pleads a suit in the Chancery in *Jamaica*; neither the term, nor the year in which the suit was instituted, was set out for certain nor averred in such positive way as is required in pleas; so the plea was overruled. Former suit. 3 Atk. 587.

[The reference must be procured by the plaintiff, and a report thereon, within a month next after filing such plea; otherwise the bill stands dismissed of course, with seven nobles costs.] Reference. [Or. Ch. 98. Com. Att 426. Com. Sol. 28.]

[A former bill pending was pleaded to a second bill, which had an addition of some new matter. Seeing the plea was good, the plaintiff was ordered by the Court to pay the usual costs of a plea allowed, and that the defendant should answer a second bill, and the former should be dismissed with twenty shillings costs.] Former suit. [1 Ch.Ca. 241.]

[If a suit be depending at common law, or in any other inferior court, it may be pleaded, and the defendant shall not be put to a motion for an election or dismission; and such plea shall be proceeded in as a plea of a former suit depending in this court between the same parties, for the same matter.]

[Where the plaintiff conceives the plea naught for matter or manner, he may put it to the judgment of the Court, and have it argued.] Plea argued. Com. Sol. 426.

[Or if he think the plea good, but not true, he may take issue upon it, and proceed to proofs, &c.] Issue upon plea.

[If a cause has been formerly dismissed this Court, but the dismission not signed and inrolled, the plea of such dismission must be upon oath; for till the inrolment it is not recorded.] Plea upon oath. [Px. Alm. 11.]

[As pleas that go to the jurisdiction, so those that go to the merits, shall be determined in open court.] Determined in open court. [Px. Alm. 13.]

[If

Entered with the Register.

[If a defendant do not enter his plea with the Register eight days after filing, it is overruled of course, and the plaintiff may take out process for an answer and costs.]

[This is intended of a plea of a matter *in pais*, and not of a matter of record, or recorded; for it is the plaintiff's part to enter these if he so likes, else the defendant within eight days after filing of the plea may take out five marks costs, as before in outlawry.]

Or. Ch. 08. Px. Alm. 12.

[If a matter not of record, or recorded, be pleaded, and the plaintiff desires the opinion of the Court, whether if it be true it be a sufficient bar, it must be argued; and if it be adjudged sufficient, and the plaintiff take issue, the defendant must proceed to prove the truth of his plea by depositions, or other proofs, as on answer, &c.]

Issue upon the plea.

Costs on the plea being overruled.

[Said, if by the defendant's neglect or default his plea is overruled; the Court, on motion or petition, in time, will order it to be re-argued, the defendant paying 5*l.* the costs on overruling.]

[Where a plea is ordered to stand for an answer, (as sometimes on arguing it is,) costs are seldom given on either side; and the benefit of the matter pleaded is generally saved to the hearing.]

[This is (I suppose) where it is somewhat doubtful to the Court, whether there be not some equity against the matter pleaded;] but now plaintiff takes out a subpœna for five pounds costs.

Hind. 224.

[If on arguing a plea be adjudged good, the bill is dismissed with seven nobles costs:] *now five pounds.*

[If the plea be overruled, the defendant pays five marks costs:] *now five pounds.*

[An infant pleaded by guardian, came of age, prayed leave to amend his plea; it was granted on paying the plaintiff five marks costs.]

Setting down pleas to be argued.

[As no demurrer, so no plea is to be set down for hearing on any certain day, except the order be brought to the Register to enter two days at least before; and after the paper of pleas, &c. is set up in the Register's office, no alteration is to be made in it.]

[Or. Ch. 52]

False plea by executor.

[A false and fraudulent plea here by an executor, has the same consequents as at law.]

[2 Ch Ca. 207.]

Outlawry. Answer.

[If outlawry or other matter be pleaded, and the plea is overruled; no other plea shall be after pleaded; but the defendant must answer.]

[Cl. Tut. 21.]

Bill

Bill by a dowress to remove a trust term. Defendant pleads himself a purchasor, but does not deny notice. Plea overruled. *Purchase. Notice.* 1 Vern. 179.

Defendant in his plea of a purchase for a valuable consideration, omits to deny notice; if the plaintiff replies to it, the defendant proceeds to prove his purchase; and it is not material if the plaintiff proves notice; for it is his own fault that he did not set down the plea to be argued, in which case it would have been overruled. *Purchase. Notice.* 3 P. W. 94.

In a plea of purchase it is sufficient denial of notice to say, that *at the time* of the purchase, and before payment of the money, he had no notice, without saying at any time before. *Purchase. Notice.* 3 P. W. 243. 2 Atk. 630.

In all cases of a plea of purchase, or marriage-settlement, notice must be denied though not charged by the bill; and it may be sufficient to deny it, either by plea or answer, notwithstanding the objection that it ought to be by the plea, since all the defendant has to do, is to prove his plea; for the defendant is not to prove a negative, *viz.* that he had no notice; however, it seems best to deny notice both by plea and answer. *Purchase. Notice.* Note 3 P. W. 244.

Where the bill charges particular and special instances of fraud or notice of the plaintiff's title on the defendant, his denial of fraud or notice generally is not sufficient. Plea overruled. *Purchase. Notice.* 3 Atk. 815.

Plea that defendant's testatrix had neither *constructive or actual notice of plaintiff's title*, not denying the facts stated in the plaintiff's bill, from which the constructive notice was to be deduced. Overruled. *Purchase. Notice.* 4 Bro. 322. 2 Ves. jun. 187. S. C.

Plea of a purchase for a valuable consideration overruled, because it did not alledge *seisin and possession* in the vendor. *Purchase. Vendor.* 1 Vern. 246.

In the pleading of a purchase or mortgage, the defendant must plead, that the vendor or mortgagor was, or pretended to be seised in fee. *Purchase. Vendor.* 3 P. W. 281.

On a plea of purchase for a valuable consideration without notice of the plaintiff's title, it is sufficient to aver, that the person who conveyed was seised or pretended to be seised, when he executed the purchase-deeds; where a purchaser sets up a fine and non-claim as a bar, he must aver that the vendor was actually seised. *Purchase. Vendor.* 2 Atk. 630. 2 Ves. jun. 450.

Plea overruled because the fraud stated in the bill was denied in the plea and not by way of answer. *Fraud.* 1 Vern. 185.

Plea of a decree and report, made absolute, signed and

Fraud. 2 P. W. 74. and ingrolled, to a bill charging gross fraud, overruled, the fraud not being denied by answer.

Fraud. 3 P. W. 143. The statute of limitations no plea, where the bill charges fraud; but then it must be charged by the bill, that the fraud was discovered within six years before the bill filed.

Fraud, Stat. of. 3 Bro. 398. 1 V. J. 402. S.C. Plea of the statute of frauds allowed, in a case where a written agreement was essentially varied by parol.

Stat of frauds. 2 Bro. 359. Plea of the statute of frauds was allowed (the agreement not being in writing,) though a parol agreement was confessed by the answer.

Stat. of frauds. 3 Bro. 161. Where defendant having acknowledged by letter, an agreement for the sale of an estate, the case is out of the statute of frauds, and a plea of the statute was overruled (*a*).

Averment. Former suit. 1 Vern. 332. It is not necessary in a plea of a former suit brought for the same matter, to aver, that such suit is depending; a plea of a former suit pending for the same matter is put in without oath.

1 Vern. 139. 1 Atk. 52. Bill by a creditor of testator against his widow, to discover her title to lands in her possession, to which she pleads a settlement and jointure, and offers to discover, if the plaintiff will confirm it; but the plea did not state the date of the deed, or the parcels of lands contained in it, and therefore the plea was overruled.

Averment. Pawn. 1 Bro. 578. Bill to discover articles pawned to the defendant, who pleads that he lent the money without notice of the plaintiff's claim; the plea should aver, that the defendant had no other articles than those specified, and although this is sworn by the answer, it is not sufficient, for it is saying that as the defendant has lent money upon *certain* articles, he shall not be compelled to make a discovery as to any others.

Averments are necessary to exclude intendments, which would be made against the pleader, for the Court will always intend the matters charged against the pleader, unless fully denied. And so in a plea to a bill for discovery of marriage with the testator, that such discovery would subject the party to punishment for incest in the Ecclesiastical Court, it was necessary to aver, that the testator was lawfully married before to her sister, and had issue. 2 Ves. 245.

To a charge in the bill, that *A.* died seised in fee of estates in *Derbyshire*, and elsewhere; plea of sale of all the estates charged in the bill, and of which *A.*

(*a*) Plea of stat. of frauds to an agreement contested, overruled. 3 Bro. 161.

died

died seised in fee, sufficient, without averring, that they were in *Derbyshire* and no where else. And the Court will not intend that there are advowsons, merely because mentioned in the fine. 3 Bro. 80. 1 Ves. jun. 136. S. C.

A plea must aver facts, to which the plaintiff may reply, and not in the nature of a demurrer, rest on facts in the bill:—the averments ought in general to be positive. In some cases, indeed, a defendant has been permitted to aver according to the best of his knowledge and belief; as that an account is just and true; and in all cases of negative averments, and of averments of facts not within the immediate knowledge of the defendant, it may seem improper to require a positive assertion. 3 Atk. 558. 589. 2 Ves. 247. 3 Atk. 70. Tothill 70. Hind. 192.

All the facts necessary to render the plea a complete bar to the case made by the bill, that the plaintiff may take issue upon it, must be clearly and distinctly averred. 1 Ves. jun. 393.

Where a plea is to the relief only, and is directed to stand for an answer; the words with liberty to except must be added, to prevent the establishing it as a good answer. *Plea stand for answer.* 3 Atk. 815. 3 P. W. 239.

On time given to answer, the defendant may put in a plea, for that is an answer, and on oath, but he cannot put in a demurrer. *Answer. Time.* 2 P. W. 464. 3 P. W. 81. 1 Bro. 56.

A defendant cannot demur, and plead or demur and answer to the same part of a bill, for the plea, *&c.* overrules the demurrer. *Plea and answer.* 3 P. W. 80.

The defendant cannot plead after a proclamation returned; nor can a plea be taken upon a general commission to take the answer only. *Sed vide* the cases above cited where a plea is considered as an answer. 1 Vern. 275.

Plaintiff entitles himself as administrator, the defendant pleads that the plaintiff is not administrator; and the plea good. *Abatement.* Not administrator. 1 Vern. 473.

After a plea put in, there can be no motion for an injunction till the plea has been argued. *Injunction.* 3 P. W. 396. 2 Atk. 113.

If a demurrer be put in to part of the bill, and an insufficient answer to the residue; the plaintiff cannot except till the demurrer is argued. But if he answers to matter of discovery, and plead as to relief, the plaintiff may except to the discovery before the plea argued. *Exceptions.* 3 P. W. 326. 2 Atk. 390. in notis.

Plea of matter, which would be a good plea to the action at law, is not a good plea here to a bill for discovery of facts to support the action. Discovery. 2 Bro. 7.

Plea

3 Bro. 11. Plea of the ſtock-jobbing act to a bill for diſcovery of ſtock tranſactions, overruled, on the ſecond ſection of the act, by which the party is bound to anſwer any bill, which may be filed in a court of equity.

Plea to a bill of diſcovery in ſupport of an action under 9 *Ann. c.* 14. for money loſt at play, by the aſſignees of the loſer a bankrupt, that the action was
2 Vez. jun. 516. not commenced and the bill exhibited within three months, overruled.

The ſtatute of limitations cannot be pleaded to a
2 Atk. 51. diſcovery.

Plea to diſcovery of whether the perſon from whom
2 Vez. 390. defendant purchaſed was a papiſt, allowed.

Privilege.
2 Vern. 83. Plea of privilege ought to be upon oath.

Two of the defendants pleaded the privilege of the Exchequer; plea overruled, becauſe there was another
1 Vern. 246. defendant, who was not privileged.

Revivor.
3 P. W. 348. If the defendant's time for anſwering be out, the Court will order the proceedings to be revived; ſo though the defendant by his anſwer inſiſts that the plaintiff is not entitled to revive; for this ought to be ſhewn either by plea or demurrer.

Plea to a bill of revivor for coſts taxed and *ordered*
1 Bro. 438. *to be paid into the Bank*, overruled.

A defendant to a bill of revivor cannot plead to that
3 Bro. 70. ſuit a plea which has been pleaded by the original defendant.

Former ſuit.
1 Atk. 53.
1 Vern. 332.
3 Bro. 544.
1 Vez jun. 484. S. C.
Where defendant pleads a decree of diſmiſſion of a former cauſe, for the ſame matters, in bar to the plaintiff's demand by his new bill, if the plaintiff does not move to refer it to a Maſter to ſtate, whether there be ſuch a decree, but ſets down the cauſe upon the new bill, it is a waiver of his right of ſuch reference, and the Court will determine it.

A plea of a bill for the ſame matter overruled, be-
2 Atk. 44. cauſe the laſt bill was brought in a different right.

Bad in part.
1 Atk. 53. 450.
2 Atk. 44. 284.
2 Vez. 396.
A plea may be bad in part, and yet not ſo in the whole; not ſo a demurrer, which muſt be good for the whole.

Adminiſtrator.
2 Atk. 51.
3 Atk. 341.
Plea to a bill for a diſcovery of aſſets, that the adminiſtrator was not a party, though it was admitted, that he was an inſolvent perſon, allowed.

Plea, for not bringing the repreſentatives of the per-
2 Atk. 51. ſonal eſtate before the Court, allowed; even though it be ſuſpected to be for delay merely, the rule of the Court muſt be uniform.

A de-

A demurrer is a dilatory, a plea not; but a plea cannot be put in a second time if once overruled: yet the Court allows the defendant to insist on the same matter by answer, which was overruled as a plea, or will order the plea to stand for an answer. *Dilatory.* 1 Vez. 247. 2 Vez. 492. 3 P. W. 95. 1 Atk. 451.

A valuable consideration set forth by the defendant, protects him from giving an answer to a title set up by the plaintiff; but a plea of a bare title, without setting forth any consideration, will not do. *Consideration. Title.* 2 Atk. 241.

Plea that a writ of right had been tried and had been determined against the plaintiff, a good plea to a bill of discovery of matter relative to the title. *Title.* 1 Bro. 305.

In a plea of title derived from one having a particular estate, and not in possession; it must be set out how the person became entitled. Title. Amb. 421.

Plea of fine and nonclaim overruled, because the pendency of the suit, which was a proper matter for equity prevented the running of the fine. Fine. 2 Atk. 389.

Plea to all except such parts of the bill as are not hereinafter answered, is too general, and therefore bad. *Exception too general.* 3 Atk. 70.

To a bill for account and discovery, a plea of release, *farther and other than in the plea set forth*, was filed, and overruled: plea containing an exception of matters after mentioned is bad. 2 Vez. 107.

Plea of a foreign sentence in a Commissary Court in *France*, relating to the same matters for which the bill was brought here, overruled; as it is a sentence in a Commissary Court only, which is of a political nature. *Foreign courts.* 3 Atk. 215.

Plea of the statute of frauds, averring first that there was no contract *in writing*; 2d, that there had been no acts done in part performance, overruled as double, and ordered to stand for an answer, with liberty to except. *Double plea.* 1 Bro. 404.

Plea of conveyance fine and nonclaim, not multifarious, but a good plea to a bill impeaching the conveyance, as not being for a valuable consideration. 2 Bro. 274.

Plea where one part is inconsistent with the other, overruled; as a plea to a discovery, that it may subject the defendant to penalties of a statute, and also of articles of impeachment exhibited against him by the commons, is inconsistent and bad. 4 Bro. 253. 2 Ves. jun. 84. S. C.

A plea stating, that the plaintiffs, who claimed as citizens of *London*, never were resident there, or ever paid scot and lot, and that they were admitted freemen by fraud, for the purpose of enjoying the exemption claimed, is a double plea and therefore bad. 3 Anstr. 738.

Plea

Heir. 2 Bro. 143. Plea that the plaintiff is not heir, bad.

Length of time. 2 Ves. 109. Length of time to prevent opening the inrolment of a decree ought to be pleaded, and is not proper for a demurrer.

Stat. limitations. 3 Atk. 225. 3 Bro. 633. Length of time since a transaction, which is the subject of dispute, must be taken advantage of by plea. 3 *P. W.* 287. *contra.*

3 P. W. 309. The statute of limitations a good plea to a bill by an infant upon his coming of age, where the administrator in trust for the infant had neglected to sue for six years. *Vide* 2 *Vern.* 368.

2 Atk. 51. Statute of limitations may be pleaded to a debt, but not to the discovery when the debt was due, nor to the discovery of a note, and whether it was the hand-writing of testator. *Finch.* 14.

3 Atk. 558. Where fraud is charged, the defendant cannot plead the statute of limitations to discovery of title, but must answer the fraud.

3 Atk. 459. The statute of limitations cannot be pleaded to a breach of trust, nor can a person who has taken a conveyance from a trustee, plead the statute.

2 P. W. 404. 3 Atk. 459. *A.* mortgages a manor with an advowson appendant, the church becomes void; the mortgagee in possession shall not present till the mortgage is foreclosed; but if the mortgagee of an advowson presents, the bill by the mortgagor must be brought within six months, in the same manner as a *quare impedit.*

2 Vern. 190. A fine and non-claim, a bar to an equity of redemption.

Forfeiture. 2 Atk. 53. Plea of the several statutes that make it penal to export wool, good, to a bill for discovery of what goods defendant carried on board his ship, the bill charging no other goods but wool to be on board.

2 Ves. 109. Defendant may plead to a discovery whether he committed waste or not, but not to the discovery of whether he be tenant for life or not; he may plead to the discovery of the act causing forfeiture.

Mosely, 75. In all cases of forfeiture, if plaintiff *alone* be entitled to the forfeiture, and waives it, the defendant must discover:—so, if he binds himself not to insist on being protected from discovery.

Gilb. 287. Though no bill of discovery is allowed upon penal statutes without waiving the penalty, yet the advantage of pleading it seems waived by partners in unlawful trade, as between themselves. *Sed quære.*

Bill for the rents and profits of an estate, and to discover whether *A.*, under whose will defendant claimed, was a papist, at the time of a purchase made by *A.* of the estate from the plaintiff's ancestor. Plea, a title under *A.*; and as to discovery, plea of the statute 11 & 12 *Wil.* 3. against papists; by which, if *A.* was a papist, defendant was disabled to take: plea allowed. 1 Atk. 526. 528. 2 Vez. 389.

Bill to set aside a judgment and verdict at law, as obtained against conscience; plea of the verdict and judgment, good:—so, to a bill for a modus plea of judgment in debt, upon the statute 2 *Ed.* 6. against one of the plaintiffs; good. Judgment. 3 Atk. 223. Finch, 204. Finch, 13.

Execution against testator, and discharge by plaintiff's order, pleaded by the executrix to a bill for discovery of assets, and allowed. Gilb. 190.

A plea, coupled with an answer which admitted the facts stated in the bill, was overruled. Answer. 2 Atk. 155.

Bill for specifick performance of an agreement stating that counsel, in the presence of the parties, took down minutes of the agreement, and gave them to his clerk to prepare the articles, but that one of the parties died before they were prepared: plea of the statute of frauds allowed. Stat. of frauds. Prec. Ch. 402.

In pleading the statute of frauds, it is necessary to aver, that the agreement was not reduced into writing. Prec. Ch. 533.

Where a bill is brought for a general account, and defendant sets forth a stated one, the bill must be amended, for the stated account is *primâ facie* a bar, till errors are assigned. Account. 2 Atk. 1.

To a bill for discovery of new matter defendant must plead or demur, he cannot insist upon such matter at the hearing. 2 Atk. 40.

In a plea of conviction of a capital offence, this Court must judge with equal strictness as if it was a plea at common law. Conviction. 2 Atk. 399.

Bill to set aside a will for fraud: plea of the will duly executed, allowed. 3 Atk. 17.

Plea, by the clerk of a company, to a bill of discovery of the company's accounts, that he was sworn not to discover without the consent of the Master and Wardens, allowed. Discovery. Finch, 24.

Bill for discovery of tythes by lessee of a parson; plea, of the 13 *Eliz. c.* 20. against non-residence, good. Gilb. Rep. 228.

Though a plea in bar be allowed, yet plaintiff may reply to the truth of it, and may except to any other part of the answer. Plea in bar. Gilb. 184.

Bill to redeem lands conveyed to defendant's grandfather for a term to be void on payment of 126*l.* and interest; plea, that defendant was devisee under the will of his grandfather, who purchased them and enjoyed them for 15 years; overruled, as there was no answer relative to the mortgage.

Gilb. 185.

Foreclosure.

Plea of foreclosure to a bill for redemption, overruled, there having been no final order for the foreclosure: a decree not signed and inrolled cannot be pleaded.

2 Ves. 450. 577.

Decree.

To support a plea of a former decree, so much of the first bill and answer as will shew that the same point was in issue, must be set forth.

2 Atk. 603.

Arbitration.

Plea to a bill for an account of a partnership, that all matters in controversy were to be determined by arbitrators, allowed.

2 Bro. 336.

Award.

Plea of an award and release good to a bill to open an account.

3 Bro. 196.

Arbitration.

Plea to a bill for discovery of frauds in breach of articles, that there was a clause in the articles, that all matters in difference should be referred to arbitration, overruled; as it did not state a reference to be pending, or to have been had.

4 Bro. 311.

Plea of an award to a bill for an account, on the ground of matters stated in the bill not having been comprehended in the award, valid, unless it appears that the award was not final.

2 Anstr. 519. 3 Anstr. 637.

A submission to arbitration was made a rule of Court, and an award made; the bill stated, that defendant in giving in to the arbitrator the particulars of the estate in his hands, wilfully misrepresented its extent and value, suppressing several parcels; that plaintiff had but lately discovered the fraud; the bill prayed to have the matter opened. Plea of the award alone without answer overruled.

3 Anstr. 735.

Payment.

Plea of payment of a sum of money into the Ecclesiastical Court, to prevent a commission of appraisement, and accepted, and a receipt given, disallowed as a plea in bar to the suit, it not shewing that the party had no further demand.

3 Bro. 70.

Dower.

Plea of purchase for a valuable consideration not good to a bill for dower.

3 Bro. 264.

Charters and acts of parliament.

Plea by the *East India* Company, to a bill for an account, filed by the Nabob of *Arcot*, that by charters confirmed by act of parliament, they had certain powers,

3 Bro. 292.

powers, by virtue of which, the acts complained of were done, overruled; the plea not setting forth the contents of the charters and acts of parliament.

Plea ought to be set down within eight days, and if it is not, it is considered as abandoned. *Setting plea down.* 3 Bro. 372.

Plea, that the person, through whom the plaintiff claimed, died a batchelor and without issue; ordered to stand for an answer with liberty to except.

Plea to a bill of discovery as to a specifick performance of an agreement, and for an injunction. The plea of an agreement made under a rule of a court of law, that the defendant (then plaintiff) should not bring error, or file a bill for an injunction, bad; but after such an agreement, the Court will not grant an injunction as to that suit. *Injunction.* 4 Bro. 498.

Plea to the jurisdiction must shew another jurisdiction: plea to the jurisdiction of all courts, is absurd. *Jurisdiction.* 1 Ves. jun. 372. 1 Vern. 59.

A plea of privilege of the university of *Oxford*, to a bill for a specifick performance of an agreement touching lands in *Middlesex*, bad; for the university cannot give complete relief. 1 Ves. 203. 2 Ventr. 363.

This Court will hold jurisdiction of a cause relating to a mortgage of the island of *Sarke*, when both mortgagor and mortgagee reside in *England*. Jurisdiction. 1 Ves. 204.

Where this Court cannot give relief it may yet entertain a bill of discovery, in aid of the Court which can give relief. 1 Ves. 205.

To an information charging an undue election of a fellow of a college: plea that by the statutes the visitor of the college ought to determine all controversies concerning the election of fellows, and that such controversies ought not to be determined elsewhere. 3 Atk. 662. 1 Ves. 78. 464.

But the extent of the visitor's power must be averred; and it must also be averred that he is able to do complete justice. And where there is a trust created, the visitor having no power to compel a performance of the trust, relief must be had in the King's courts of general jurisdiction. 1 Ves. 474. 1 Ves. 475.

Plea of the statute of limitations to so much of the bill as sought satisfaction for the arrears of an *annuity*, or so much as was stated to have accrued due previous to six years before the bill; overruled, because there is no time from which it can run. *Stat. Limitations.* 2 Ves. jun. 578.

Defendant pleaded forty years possession, without account or admission of any debt, to a bill setting up an old mortgage, and stating an account settled, and that 2 Ves. jun. 669.

owing to infancy, coverture, and other disabilities, plaintiffs could not proceed. Plea allowed.

Amendment. 2 Bro. 143.

With respect to amendments of pleas, there certainly have been cases, in which the Court has permitted pleas to be amended, where there has been an evident slip or mistake, and the material ground of defence seemed to be sufficient, yet the Court always expects to be told precisely what the amendment is to be, and how the slip happened, before they allow the amendments to take place. Application to amend a plea or plead anew refused. 3 Bro. 310.

Replication. Prec. Ch. 58.

If the plaintiff replies to the defendant's plea, he thereby admits the plea to be good, if it be true; and the validity of the plea can never after be considered, but only the truth of it; as he proves it, or the plaintiff disproves it.

Executor. Ca. T. Talb. 3.

Where the testator had pleaded to a bill, and died before the plea was argued, the executor may plead *de novo*; for the first cannot be argued at all.

Plea overruled by answer. 1 Anstr. 14. 59.

Where a plea is a bar to the whole bill, if it be a bar at all, an answer to any part of the bill overrules the plea.

Averments.

Bill for an account, setting forth an award, and charging that it was obtained corruptly, and stating the corrupt transaction. Plea of the award, denying corruption and all the particular instances specially, by way of averment; the plea was held bad, as not bringing the cause to one point: leave to amend was given by striking out the averments. 1 Anstr. 59. 97. *Vide* 3 *Atk.* 529. 3 *P. W.* 315. 1 *Anstr.* 258. 276. 3 *Anstr.* 735.

Assignment under commission of bankrupt.

An insolvent debtor brought his bill against his assignees under the 14 *Geo.* 3. and against a debtor to his estate, stating collusion between them in not recovering the debt, and praying that the assignees might be removed, and that a specifick performance of an agreement for a lease might be decreed against the debtor; plea by the debtor of the assignment under the act, and that the right to sue was vested in the assignees; that the estate was insufficient for the payment of plaintiff's debts, and denying collusion. The plea was held good. 1 Anstr. 101.

Second plea. 2 Anstr. 407.

After a plea overruled upon a ground of form, it seems irregular to plead the same matter again more formally. *Vide Mitf.* 191.

3 Bro. 70.

So also a plea, which had been put in by the original defendant, and overruled, is irregular to the bill of revivor.

Bill

Bill of foreclosure, stating the plaintiff to be entitled to the equity of redemption of a messuage, and forty acres of land held by defendant as mortgagee, defendant pleaded an absolute title in himself, and stated that the premises consisted of a messuage and tenement, (as it was denominated in his conveyances,) and averred that they were the same which were meant by the bill:—objection that there was no plea to the forty acres of land, and that the plea being to the whole bill was bad. Plea overruled. To a bill of foreclosure. 3 Anstr. 633.

Bill for an account against the representatives of an *East India* Governor; plea, that the plaintiff was an alien and an infidel, overruled. Alien. 1 Atk. 51.

PRIVILEGE.

[THE privilege here intended, hath a double respect. First, as it concerns the persons judging in, assisting or ministering to the Court; and, as such, it is a right whereby one by his office or usefulness to the Court, is suable and impleadable in this court only.] What.

[This privilege belongs to the Lord Chancellor or Keeper; to all the Masters, Ministers, Officers, and known Clerks of the Courts; and to the menial servants of the Chancellor or Keeper, and of the Masters, Ministers, and Officers. And they may, as the case requires, be impleaded here, either as at common law in the Petty-Bag office, or in a way of equity by *English bill.*] To whom it belongs. [Or. Ch. 6.]

[If any so privileged be arrested in a civil plea, by the process of any other court, he may have a writ of privilege containing an absolute *supersedeas*, and requiring the plaintiff, *quod sequatur in curia ubi*, &c. *si voluerit.*] Supersedeas. [1 Px. Alm. 34.]

[Secondly, the privilege here spoken of regards the suitors of the Court and witnesses; and is the right of being exempted and freed from arrests by process of other courts for some short time, and in certain cases. And if they be interrupted by an arrest in their necessary attendance, they may have a *supersedeas* of privilege for their enlargement, and stay of the suit. But this is merely temporary, and a *procedendo* may be had after the reason of privilege ceaseth.] To whom it belongs. Suitors of the Court. [Toth. 23.]

Certificate.

[Clerks of the Court must have a certificate from the Master of the Rolls or office where they write, before a writ of privilege be granted them.]

[Or. Ch. 6.]

Arbitrator.

A party attending an arbitrator under an order of Court is privileged from arrest.

3 Vez. jun. 350.

A father is the natural guardian of his child, but he must not take the child by force, or in going to or returning from court.

3 P. W. 151.

Servants of the officers of the Court.

[Menial servants of a Master, Minister, or Officer of the Court, must first make affidavit that he is so. The writ for him must first be presented unto and signed by the Lord Keeper; and the affidavit must be at the same time annexed to it. And such writ shall continue in force no longer than he continues menial servant.]

[Or. Ch. 7.]

[Privileged persons have their writs sealed without fee.]

[Or. Ch. 81.]

Where persons intitled to privilege shall be sued.

[They are not to be sued elsewhere than in this court, either by *latin* plea, in the Petty-Bag office, or by *English bill*, as the case requires; save in cases where the Queen is immediately concerned.]

Writ of privilege.

[A clerk of this court sued to an exigent in the Common Pleas, issues a *supersedeas* to the sheriff, *quia improvide emanavit*, and then brings his writ of privilege directed to the Justices of the Common Pleas, requiring them to surcease; and upon a long debate his privilege was disallowed, and he driven to answer: for the Court was lawfully possessed of the plea by the defendant's own act, inasmuch as he had by the *supersedeas* affirmed the jurisdiction of the Court; for the *supersedeas*, *quia improvide*, *&c.* always recites the defendant's appearing in Court by his attorney, and shews his name; so that this is merely his own fault. But if he had not sued out the supersedeas, the Court, notwithstanding the exigent, would upon bringing his writ of privilege to them, have allowed it, and granted a special *supersedeas* of the outlawry to the sheriff.]

[Dyer, 33—6.]

Imparlance admits the jurisdiction.

[So where a privileged person appears and imparls; he admits the jurisdiction of the Court; and can never disaffirm the same.]

[2 Px. Alm. 40.]

County palatine of Lancaster.

[A defendant here refuses to answer, because he was an inhabitant of the county palatine of *Lancaster*, but was overruled; the plaintiffs being ministers and servants of this Court, and as such intitled to privilege here.]

[Pr. H. Ch. 117.]

[Said,

[Said, if a necessary officer such as this Court cannot be without, as a Register, Master in Chancery, or such like, be in prison upon *mesne process*, the Lord Chancellor may enlarge him; but if he be in execution for debt or damages, he shall have no privilege; for the plaintiff would be without remedy, if the party were once set at liberty. But this is to be understood with some limitation; for where by order of this Court *one* was discharged by supersedeas, and the plaintiff brought an action of escape against the sheriff, this Court ordered him to discharge the action, and that he should stay all proceedings against the sheriff.] Officers of the Court.

[The plaintiff and defendant having joined in commission to examine witnesses, the defendant two days before the execution of the commission, causes the plaintiff to be taken in execution for the same cause depending here: the Court ordered the defendant to pay costs, and damages to be taxed; to discharge the plaintiff out of execution, at his the defendant's costs, the plaintiff giving a new judgment; and also to be at the charge of a new commission; and ordered an injunction till hearing.] [2 Px. Alm. 42 2 Ch. Rep. 22. 1 Ch. Rep. 298]

[Such as have privilege of this Court sometimes have a *supersedeas* of privilege granted them as a protection. The most extensive of which sort that I find, contains both an injunction and *supersedeas*, directed to all and singular Justices, Judges, Sheriffs, &c. enjoining them not to molest or vex a clerk of one of the six clerks of this Court in his privileges; nor to force him to appear or answer before any Judge, &c. save of this Court, upon any plaints, pleas, trespasses, or demands, which concern not the Queen's person; (pleas of freehold, felonies, and appeals only excepted). Nor to impannel him on juries; nor to put or choose him into any office of collector, churchwarden, or other common troublesome office; and if any distress has been made upon him on that account, without delay to release it.] Supersedeas of privilege. [1 Px. Alm. 105.]

[In *Richard* the third's time a suitor of this court petitioned for such a writ; but the six clerks certified they could not find any ancient precedent for a writ of privilege by way of protection, for such as have suits depending here: but for officers and ministers of the Court; or such as are brought up by process to appear or testify: the effect of which was, that, according

cording to custom, &c. men, their domesticks and servants, coming by the Queen's special command to her presence or courts, there staying or returning home, are under special protection and defence, and ought not to be arrested, or imprisoned, by reason of any debt, account, trespass, or contract, then shews the cause of their attendance, and commands that the person or persons be not arrested or imprisoned during such attendance, &c.]

[Px. Alm. 109.]

[But if any that is privileged by this Court be arrested, he may have a *supersedeas* of privilege for his enlargement, or an *habeas corpus*.]

Suitors of the Court.

[A plaintiff coming up to this Court half a year after his bill exhibited, was arrested in *London*, and had his privilege; it appearing he came up only for the following his suit.]

[3 Px. Alm. 25.]

[A plaintiff arrested here, when he came up to examine his witnesses, was discharged by supersedeas of privilege.]

Ibidem.

[A defendant coming to execute a commission, being arrested, had a *habeas corpus cum causa*, and was set at liberty by this Court.]

Ibidem.

Disobedience of privilege.

[If an officer refuse to allow, or disobeys a writ of privilege, or requires bail before he will discharge the parties; it is a contempt for which many have been committed.]

Ibidem.

When the privilege determines.

[Where a defendant got a writ of privilege as servant to the Lord Keeper, and removed two suits against him in *London*; the Lord Keeper declaring in open court, that the defendant is not now his servant; therefore ordered, that the said causes be remanded, and that the defendant be not allowed his privilege of this Court.]

[Cary, Rep. 146.]

Exchequer.

[Held in the Exchequer, that if the clerk of the Hamper be sued by bill in the Exchequer, by the Queen's assignee, and he upon a *supersedeas* brought by him insists upon his privilege as an officer of this Court, it shall not be allowed him: for every accountant ought to be present and attendant in the Court of Exchequer; and it is for the Queen's advantage, and convenient for himself that he be sued there where he is to attend.]

[2 Px. Alm. 41, 42.]

When privilege lost.

[If one not privileged be joined defendant with one that is, neither shall have privilege.]

[Toth. 150—4. Cary, 96.] 1 Vern. 246.

[If

[If an officer of this Court and his wife be sued in another court of law, &c. they shall not have privilege; for her attendance is not requisite in this court, nor is she impleadable here in the Petty-Bag; and besides, where the common law and a private custom or privilege encounter one another, the common law shall have the preference. And therefore it is, that where an action is brought against two, one of them only having privilege, his privilege shall not be allowed him.] [2 Px. Alm. 44.]

[Where two persons were sued here, one of them dying, the survivor pleaded his privilege of the Exchequer; the plea was overruled; because, for ought appeared, the deceased had no privilege there; and so this Court (waiving the consideration, whether the chequer-men ought to have privilege here or no) was at first lawfully possessed of the cause.] Exchequer. [1 C. R. 70.]

[If a privileged person of this Court do untruly surmise that one impleaded in another Court is his servant, and thereupon procure him a writ of privilege to supersede the action, whereby the plaintiff is delayed; an action of the case will lie against such officer.] Writ of privilege upon a false suggestion. [2 Px. Alm. 44.]

[A *capias ad satisfaciend'* lies not in a suit by attachment of privilege: for no *capias ad satisfaciend'* lies but where process of outlawry lies upon the first *capias*; and here the first process is not a *capias*, nor does process of outlawry lie upon it.] Capias ad satisfaciendum. [F. L. 10. 2 Px. Alm. 44.]

[The Lord Chancellor *Egerton* declared, that no chequer-man is privileged against a *subpœna* of this Court. And several pleas by officers there, as Register, Receiver, &c. have been overruled.] Exchequer. [Toth. 150. 3 Px. Alm. 21, 22.]

As to the privilege of the officers of the revenue of being sued in the Exchequer, *vide* 1 *Anstr.* 205. Exchequer.

A defendant arrested by process out of the Exchequer, whilst protected by the privilege of the Common Pleas as a suitor there, may be discharged by either court. 3 Anstr. 941.

[All proceeding in the Petty-Bag office in Chancery, by or against any minister of this Court, for any matter or thing determinable at common law, are to be pleaded to issue, as at common law; and the record thereof to be delivered *per manus Cancellarii*, into the Court of Queen's Bench, or Common Pleas; at the election of the plaintiff.] Petty-Bag. [3 Px. Alm. 44, 45.]

[After trial had, the record shall be remanded into this Court, and judgment shall be given here.]

[4 Inst. 50.]

Peers and members of parliament.

[All peers and other members of parliament, have privilege during parliament, for themselves, their menial and other necessary servants, and goods, so as not to be arrested, &c. except for treason, felony, or breach of the peace, &c.]

[Sometime ago their privileges were stretched far, and with some uncertainty; so that it was thought necessary, in some measure, to ascertain and restrain them by acts of parliament.]

Stat. 12 W. 3.

[First, by the act of the 12 *W.* 3. which gives liberty to any person to exhibit a bill against any peer of the realm, or any knight, citizen or burgess, of the House of Commons, for the time being, or any of their menial or other servants, or any other person intitled to the privilege of parliament, in the High Court of Chancery, &c. at any time from and immediately after the dissolution, or prorogation of any parliament, until a new parliament be recalled; and from and after any adjournment of both houses, for above the space of fourteen days, until both houses shall meet and reassemble; and the party may proceed therein by letter, or *subpœna*; leaving a copy of the bill with the defendant, or at his house or lodging, or last place of abode; and for want of an appearance or answer, or for nonperformance of any order or decree, or breach thereof, may sequester the real and personal estate of the party, as is used and practised where the defendant is a peer of the realm; but shall not arrest or imprison the body of any knight, citizen, or burgess, or other privileged person, during the continuance of privilege of parliament.]

[By a further clause in the same act, privilege of parliament is taken away from the King's original and immediate debtor, &c. in any sum, &c. for any breach of his revenues, or other original or immediate debt or duty to the King.]

Stat. 2 Ann. c. 18.

[And by an act 2 *Annæ, cap.* 18. privilege of parliament is taken away from any employed or intrusted in the King's revenues, or any other office or place of public trust, in any action or suit for any forfeiture, misdemeanor, or breach of trust, of, in, or relating to such office, &c. or any penalty imposed to enforce the due execution thereof. But both in this statute and the

the former, the bodies of lords of parliament are preserved from arrests, &c. and so are those of knights, citizens and burgesses of the House of Commons.]

[If any breach be made in their privilege, the respective houses of parliament will upon complaint, call the parties concerned therein; and if it is proved, commit them for a breach of the privilege of the house.]

[If therefore, during the time of privilege, you want to proceed immediately against a privileged person, you must either get him to agree to waive his privilege, which in most cases, (if he be a man of honour, &c.) he will not refuse; or you must petition the house where he sits, that he may do so; and then he seldom refuses it; or if he does, the house, if it see cause, will order it.] Waiver of privilege.

[If the waiver of privilege be of his own generosity, it is necessary you have it under his, or his solicitor's hand, for your indemnity.]

[Said, if a trustee be made a defendant here, he shall not have privilege, though he be a member of parliament.] Trustee.

Though the Court will not proceed against a member, who has privilege of parliament; yet if he sues at law, and a bill is brought here to be relieved against that action, the Court will make an order to stay proceedings at law, till answer or further order. *Parliament.* 1 Vern. 329.

Bill against an ambassador to redeem; Court ordered all proceedings to stay for a year and a day, unless the defendant should return sooner—an ambassador may at law cast an *essoin* for a year and a day, and afterwards renew it, if the occasion continues. *Ambassador.* 2 Vern. 317.

Suing the bail below pending a writ of error in parliament, is a contempt and breach of privilege. *Writ of error.* 1 P. W. 685.

If an ambassador's servant brings a bill, he must give security for costs, as being a privileged person. *Ambassador's servant.* 2 P. W. 452.

Privilege of a bankrupt from arrests during his examination, extends to an attachment for not paying money under an award made a rule of court. 3 Vez jun. 554.

A person residing here as a foreign minister, cannot by any act or acts of his own, waive his privilege. A foreign minister being a trader, does not thereby forfeit his privilege; a foreign minister's servant may. A consul is not intitled to the privilege belonging to ambassadors or ministers intrusted to transact matters of state. *Waiver of privilege.* Ca. Temp. Talb. 280.

PROCEDENDO,

(*Vide Bill.*)

What.

[IS a writ to the Judge of an inferior court, requiring him to proceed in a cause formerly removed hither by *certiorari*, or other writ, or stayed for some time by *supersedeas*.]

[1 Pr. Afm. 59. Cl. Tut. 299.]

[If the plaintiff in a *certiorari* bill fail of making his proof in fourteen days, a procedendo may be issued, except he get an order of court for further time; upon affidavit, that his witnesses are beyond sea, or very remote, or such like.]

[Pr. H. Ch. 8.]

PROCESS AND WRITS.

What.

[A WRIT of this Court is the Queen's precept in parliament, sealed with the Great Seal, directed to one or more; which direction is called the salutation, because of the word *salutem*. The body of the writ is either *mandatory*, requiring something to be done; or *prohibitory*, enjoining something not to be done. When it is returnable here, it is in *cancellaria*, &c. *in Magna Britannia*. The conclusion is called the *teste*, from the words *teste meipso*, &c.]

Returns.

[Some writs are returnable *immediate*, as a *subpœna ad respondendum*, where the defendant dwells or is in *London*, or within ten miles of it.]

[Some at a day certain.]

[Others not at all; as, where they are *prohibitory*; or the matter commanded is to be done out of court; as, payment of money, &c.]

When tested.

[Process may issue and be *tested* at any time, though out of term; this Court being always open.]

[And though the Lord Chancellor appoints a certain number of seal-days, both before and after each term; yet in the vacation there are private seals besides, for such as cannot conveniently stay till the general seals.]

[No

[No common writ or process shall be put to the seal, till it be first signed by the clerk to whom the same doth properly belong, or his deputy; or in his or their absence, by some other six clerk not towards the cause.] Signed by six clerk. [Or. Ch. 136]

[Nothing shall be paid for the seals of writs of privileged persons, *paupers*, or renewed writs.] Privileged persons. [Or. Ch. 141.]

[A party that sues or useth writs irregularly; shall not take advantage of his own wrong, therefore when a plaintiff sued out two attachments into several counties, and took the defendant on each; the Court would not order him to enter his appearance.] Irregularity.

The Court will not suffer a man to be sued at law for executing the process of the Court, though it issued irregularly. *Irregularity.* 1 Vern. 269.

An irregularity in processes may be cured by the defendant's appearance. How cured. 3 Atk. 569.

Leaving a subpœna to appear and answer at the lodgings of a defendant, who was not to be found, not good service, though an order was obtained for that purpose, it appearing afterwards that the defendant had left his lodgings above a year before the subpœna served. *Service.* 2 Vern. 369.

If the party's clerk in court be dead, no process can be taken out against the party, until he has appointed a new clerk in court, and a *subpœna ad faciend. attornat.* taken out for that purpose. *Subpœna ad faciendum attornat.* 1 P. W. 420.

Those only are defendants to a bill against whom process is prayed. *Defendants.* 1 P. W. 592.

The petitioner was arrested on a *Sunday* by Lord Chancellor's tipstaff, under a warrant *for a contempt* in disobeying an order: he now prayed to be discharged; but the Chancellor thought the arrest lawful, though on a *Sunday*. *Arrest.* 1 Atk. 55.

PROCHEIN AMY.

(Vide Infant.)

[IS a friend by whom an infant or feme-covert sues in this court.]

[Where a suit was by *prochein amy* not sufficient to answer costs, the Court ordered that another should be named.] Costs.

[It

Infant.

[It should seem that an infant may sue here either by himself, by *prochein amy*, or by guardian, as the Court pleases.]

[Toth. 108, 9.]

[And so it should seem he may defend; and if of discretion shall answer upon oath.]

[Ibid.]

[An infant of twelve years was ordered to answer, not upon oath.]

[Toth. 11.]

Outlawry.

[Outlawry, or excommengement in a guardian, or *prochein amy*, cannot be pleaded or alledged in disability, where an infant sues or defends by him: because he acts *in auter droit*.]

[Cl. Tut. 13.]

Costs.

An infant by prochein amy brings a bill and never stirs in it after he came of age; the bill is dismissed: the infant and prochein amy are both liable to costs.

2 P. W. 297.

A *prochein amy* need not be a relation, but he must be a person of substance, because liable to costs.

1 Atk. 570.

Prochein amy allowed costs paid on the dismission of the infant's bill, out of the infant's estate.

2 Ves. 466.

Depositions.

The depositions of the *prochein amy* of the plaintiff cannot be read for the plaintiff, as he is liable to costs. Nor can depositions of the wife of the *prochein amy* be read for the same reason.

3 Atk. 511. 547.

Suits by different *prochein amies.*

Where there are two suits by different prochein amies, the Court will refer them, to see which is the most proper, because the Court, as guardian of infants, will take care that what is done shall be for their benefit.

3 Atk. 603.

Baron and feme.

Where there is any thing for separate use of the wife, a bill ought to be brought by her *prochein amy* for her; otherwise it is her husband's bill:—but such bills cannot be filed without the wife's consent, as may be done in case of an infant.

2 Ves 452. Prec. Ch. 376.

Appointment of a new *prochein amy.*

Bill by an infant, and after decree *prochein amy* died; defendant petitioned that the plaintiff might name a new *prochein amy* within ten days, or on default, that it might be referred to a Master to appoint a proper person; and it was ordered accordingly.

Amb. 398.

Security for *costs.*

After answer, the plaintiff is not compellable to change the next friend on account of poverty; the application should be before answer, to give security for costs.—A next friend cannot sue *in formâ pauperis*, but ought not to be discharged for poverty.

2 Ves. jun 409, 410.

ATTACHMENT WITH PROCLAMATION.

[THIS process issues upon a contempt, after a *non est inventus* returned upon an attachment.] When it issues.

[The proceedings of which see under title attachment.]

[If a *non est inventus* be returned hereon, then issues a commission of rebellion.] Commission of rebellion.

There must be fifteen days between the *teste* and return of this writ, if a sequestration be intended; unless an order be obtained to make the several processes returnable immediately, when the defendant resides within ten miles of *London*. Return. Hind. 115.

After a contempt duly prosecuted to an attachment with proclamations returned, no commission to answer shall be made out, nor any plea or demurrer admitted but upon motion in court, and affidavit made of the party's inability to travel, or other good matter, to satisfy the Court touching that delay. Answer. Gilb. Forum. Rom. 71. Hind. 115.

The present practice is upon payment or tender of the costs to the clerk in court, which, *upon an arrest*, are one pound three shillings and sixpence (*a*), to enter an appearance; or if the process issued for want of answer upon the like tender or payment to move or petition for time to answer, (and in a country cause a commission to take the answer,) stating the party is in contempt; but the Court will not give the same time, as if no contempt had been incurred. Answer. Contempt. Ibid.

(*a*) Otherwise one pound one shilling and sixpence.

PRO CONFESSO

Taking Bills.

IF a defendant *appears* to a bill, and stands out in contempt to a sequestration, the cause is set down to be heard; and the record of the bill produced and taken *pro confesso*: but if time be given to answer, though after sequestration, and though the answer be reported insufficient, yet the bill shall not be taken *pro confesso*. 2 *Atk.* 21 *contra*. Where defendant appears. 2 P. W. 556.

This

This practice of taking a bill *pro confesso* is not of long standing, the custom formerly being to put the plaintiff to make proof of the substance of the bill, though the defendant stood out to the last process, a sequestration.

2 Eq. Ca. Abr. 179. pl. 5. 1 Vern. 224. 1 Vern. 247.

Appearance.

Where the defendant *appeared* to the subpœna, and prayed a further time to answer, and had it, and afterwards stood out all the processes of contempt, the bill was taken *pro confesso*, though the sequestration was not sealed or executed; but if the defendant had *not appeared*, the Court would not have decreed a bill to be taken *pro confesso*, but ordered a sequestration against his real and personal estate, until he cleared his contempt, for no decree could be had against him till he had appeared.

N. Ch. Rep. 65. 10 Mod. 431. 2 Ch. Rep. 284.

Answer.

The defendant being a prisoner in the King's Bench refused to answer; whereupon it was prayed that the bill might be taken *pro confesso*, if he did not answer by a certain day; but the Court was of opinion, that unless the defendant was in the prison of the court, the bill could not be taken *pro confesso*; whereupon he was removed by *habeas corpus* into the Fleet, and having a day given him to answer, and he still refusing, the bill was taken *pro confesso*.

N. Ch. Rep. 50.

Where the defendant being a prisoner in *York* goal, and the demand so trifling, it would not bear the expence of removing him by *habeas corpus* to the Fleet; it was moved, to save this expence, that for want of an appearance, the bill might be taken *pro confesso*: the motion was refused, as the plaintiff might proceed in the usual method pointed out by the 5th *Geo.* 2. *c.* 25. which directs if a defendant absconds to avoid being served, upon a positive affidavit of the fact, the Court, upon motion, will fix a day for him to appear, which order must be inserted in the Gazette, *&c.* in pursuance to the act; and if the defendant refuses to appear, upon affidavit thereof, the bill will be taken *pro confesso*.

3 Atk. 690.

Where defendant does not appear.

Where the defendant is in custody upon process of contempt, (after appearance,) and being brought into court and hearing the bill read to him, and being required to answer, obstinately refuses so to do; in this case the Court will order the bill to be taken *pro confesso*.

Mosely 384.

And if the defendant demur, and the demurrer be overruled, and the defendant ordered to answer, if he refuses, the bill may be taken *pro confesso*.

1 Harr. 276.

A quaker

A quaker being in contempt for not anſwering upon oath; and he being by order brought to the bar, the Lord Chancellor admoniſhed him of the peril of perſevering; but he ſtill refuſing to anſwer upon oath, the bill was taken *pro confeſſo*. 2 Ch. Ca. 237.

But it is preſumed if a quaker will now put in his anſwer upon affirmation, it is ſufficient; if however he refuſes, then the bill may be taken *pro confeſſo*. 1 Har. 203. 8 edit.

Plaintiff brought her bill againſt defendant for an account of profits, *&c.* and after defendant had fully anſwered, plaintiff amended her bill three times, to which defendant put in three ſeveral pleas and demurrers, which had been all overruled, and the defendant ſtood in contempt to a ſequeſtration for not anſwering the amended bill; the plaintiff now moved for liberty to ſet down the cauſe on the ſequeſtration, in order that the bill might be taken *pro confeſſo*, when it was objected that there being an anſwer to part, (*viz.*) the original bill, the bill could not be taken *pro confeſſo*, becauſe part was fully anſwered and denied.

Lord Chancellor was inclined to order the bill to be taken *pro confeſſo quoad* the particulars not anſwered: but the defendant offering to anſwer by the next term, except as to matters of account, no order was made upon the main queſtion. 2 *P. W.* 556. *contra*. 4 Vin. Abr. 446. pl. 1. 2 Atk. 24.

After an order to take a bill *pro confeſſo*, merely putting in an anſwer is not ſufficient to ſet aſide the order, but the defendant muſt apply upon ſome reaſonable grounds. 2 Bro. 279.

PUBLICATION.

VIDE

Bill to perpetuate Teſtimony.
Depoſitions.
Witneſs.

[PUBLICATION ſeems in the legal ſenſe to be a power or liberty in the clerks or examiners by a rule or order of Court, or conſent of parties, to ſhew depoſitions openly, and give copies of them.] What.

How passed.

[When both plaintiff and defendant have examined what witnesses they please, and are ready to go to hearing, the clerks on each side may, on consent signified by signing each other's book, pass publication; or else may give each other rules for publication, (viz.) where witnesses are examined in court; first, an ordinary rule, and then a day to shew cause why publication should not pass; where they are examined upon a commission returned, one rule only.]

[Px. Alm. 23.]

[Either party that has examined and would have publication, may give the rule, &c.]

[Toth. 22.]

[The day given by rule, is a week; which being expired, and no good cause shewn to the contrary, publication shall pass. *Vide Rule.*]

[Px. Alm. 23.]

Examiner served the rule.

[But if any of the depositions were taken before the examiner, a copy of the rule and order must be delivered to him; as well to authorize him to give copies, as to tie him up from any further examination.]

How it passes when witnesses are examined only on one side.

[Where the cause is at issue, and one side has examined witnesses; but the adverse party has neither examined in court nor had a commission, the other party gives him first a rule to produce his witnesses; after that a second to examine them; upon which he may either examine them in court, or have a commission of course: if he does neither, then a third rule is given him to shew cause that day seven night, why publication should not pass; which, if he does not shew, publication passeth.]

[Pr. H. Ch. 16, 17.]

[Such respective rules as aforesaid must be given where witnesses are examined in court for the plaintiff, or *ex parte* by commission; or that none are examined on either side: to conclude the adverse party from examining.]

[Pr. H. Ch. 17.]

When to pass.

[Publication and hearing are not to be in the same term, except there be special cause to the contrary.]

Cl. Tut. 12.

[The Court granted a commission returnable *primo die* of the following term; and ordered, that publication should pass a week within term; but would not order it the day the commission was returnable.]

Time enlarged.

[The Court on cause shewn will, and sometimes on a bare motion does, enlarge the time of publication.]

On all applications to enlarge publication, it is necessary to state when and in what manner it passes, whether by rule or order.

Hind. 382.

[Where witnesses are examined only to inform the

conscience of the Court, the depositions are never published, but by special order or consent of parties.] [Toth. 23]

Publication may pass by order, as where a rule is given to pass publication, and afterwards, before the expiration of the rule, the same is enlarged for a certain time by order; where the time limited by such order is expired, publication passes in consequence of such order. When it passes by order. 1 Harr. 498.

If one of the parties, after publication passed, has an order to examine upon the usual affidavit that he has not seen the depositions, the other party may not only cross examine, but examine at large. Order to examine after publication. 1 Vern. 253.

After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses in order to falsify the defendant's examination; this tending to multiply causes and make them endless. Examination to falsify the defendant's examination. 3 P. W. 413.

The Court will not proceed in an original cause, till the answer comes in in the cross cause, but will stay publication; and the application is upon notice to the other side to enlarge publication in the original suit to a fortnight after the answer is come in to the cross bill. Publication stayed. Cross bill. 1 Atk. 21. 291. 2 Ves. 336.

You cannot move to dismiss a bill for want of prosecution after publication is passed; and it is no hardship to the defendant, for if the bill is dismissed at the hearing, he will have his full costs. Dismission after publication. 3 Atk. 558.

It is too late at the hearing of the cause to object to depositions taken *de bene esse*, the order for publication ought to have been discharged upon motion. 2 Atk. 90.

See 1 *Harrison Chan. Prac.* 497. and *Hind.* 378.

RECEIVER

[IS an indifferent person between the parties, appointed by the Court to receive the rents, issues, or profits, of land or other thing in question in this Court, pending the suit; where it does not seem reasonable to the Court, that either party should do it: And he is to account for such his receipt, when the What.

Court shall require him. And to secure his doing so, he is commonly ordered to enter into a recognizance with sureties, in such a sum as the Court shall direct.]

[After he has made up his accounts, (which is to be done before a Master,) the Court upon motion and affidavit of notice of the motion, and certificate of the Master that he has accounted, &c. will order his recognizance to be discharged.]

Possession. The appointing a receiver is not in all cases a turning the party out of possession; as where a receiver is appointed of an infant's estate; in such case the receiver's possession is the possession of the infant; but on the appointing a receiver in an adversary suit, there the receiver's possession is the possession of him who has the right.

3 P. W. 379.

Title. The Court will not order a receiver of an estate, where the matters in dispute depend upon a mere legal title, except strong ground of title is shewn and the rents are in danger.

Amb. 311.

Recognizance. Receiver continued of an infant's estate upon his own recognizance only, but this is unusual.

Amb. 599.

Ecclesiastical court. This Court will not appoint a receiver of personal estate, on account of a dispute in the ecclesiastical court concerning a probate, as that Court may grant administration *pendente lite*; neither will the Court lay down a rule, that upon a bill by an heir at law to controvert a will a receiver shall be appointed.

2 Vez. 324.
2 Vez. 360.

Infant. The Court will not appoint a receiver of an infant's estate before bill filed.—The Court has not jurisdiction to appoint a receiver, unless a cause is pending, except in the cases of idiots and lunaticks.

1 Atk. 578.
2 Atk. 315.

Sureties. The course of the Court requires a security by the receiver, and two sureties, in a recognizance; and taking a mortgage belonging to the receiver instead of it, is very improper.

3 Atk. 237.

Sureties for a receiver will not be discharged upon their application.

2 Vez. 401.

Ordered to pay interest. A receiver during plaintiff's infancy, who had no guardian, was directed to place out the surplus rents, when the same should amount to a competent sum on government or other securities; having never placed it out, he was directed to pay four *per cent*, from the time of the decree, till the infant came of age. And it is no excuse, the Master gave no directions

3 Atk. 274.

or

or that the buildings and farms were in a bad condition.

The receiver settling the accounts and delivering the vouchers to plaintiff when he came of age, who admitted the balance, and received it without objection, has no weight against a motion to charge him with interest; as this transaction was only two days after plaintiff came of age. 3 Atk. 275.

A receiver appointed by this Court shall not make good any loss which was not owing to any default of his, for where the rents are large, it is a necessary precaution to remit them by bills to *London*, rather than in specie: and where a receiver pays money to a tradesman, and takes bills for the sum, if he was in credit at the time, though he fails soon after, it shall not affect the receiver. Not liable to losses. 3 Atk. 480.

A receiver may be granted on motion, notwithstanding the reservation of all matters under the decree, for this is a mere provisional order. Where granted. 3 Atk. 690.

If a receiver be appointed, and the owner of the estate is in possession, application should be made to the Court, that he deliver possession to the receiver, who cannot distrain on the owner. Owner in *possession*. 2 Ves. 401.

It is unusual to move for a receiver before answer, but in particular cases it has been done. *Answer*. 2 Bro. 158.

Exceptions to the Master's report of a proper person to be receiver overruled, as the report ought to stand till the party approved is impeached as an improper person. *Report*. 2 Bro. 253. 3 Bro. 508. 2 Ves. jun. 137. 3 Ves. jun. 516. 588.

It is no objection to a receiver, that he is a practising barrister: but the solicitor in the cause cannot be receiver, neither can a trustee. 2 Ves. jun. 137. 3 Ves. jun. 516.

In a cause for an account of a partnership, both partners being dead, a receiver shall be appointed; *secùs* in a case of surviving partners; except where there is gross abuse. *Partners*. 2 Bro. 272.

An admission of assets to answer rents by the executor of a receiver makes him liable to interest, if any was made. *Interest*. 2 Bro. 616.

A receiver of a public trust, (having a salary,) and making interest of balances in his hands, is accountable to the trustees for interest made *ultra* his salary; a receiver shall pay interest for money kept in his hands. *Interest*. 3 Bro. 41. 1 Ves. jun. 85.

On motion that a receiver appointed by the Court might be at liberty to distrain, the order was granted, *Distress*.

3 Atk 750. 3 Bro. 87. 1 Vez jun. 161.

but the distress was to be in the name of the person having the legal estate, and the Court said that the application was unnecessary.

Ejectment. 3 Bro. 88. 1 Vez. jun. 164.

A receiver cannot proceed in ejectment against the tenants, nor raise the rents upon slight grounds, nor let even for a year without application to the Master.

3 Bro. 365.

The Lord Chancellor intimated his opinion, (without deciding the case,) that if a receiver be appointed by the Court on the application of a mortgagee, or other incumbrancer, and he afterwards embezzle or otherwise waste the rents and profits, the loss must fall on the mortgagor.

General order. 4 Bro. 157.

The Masters, on the second seal after *Trinity* term in every year, are to certify to the Court the state of the receivers' accounts in their respective offices.

Tenant in common. 4 Bro. 414.

Tenant in common in possession, ordered upon motion to give security for payment of the proportion of rents to his co-tenant: otherwise a receiver would be appointed.

Estate in West Indies. 1 Vez. jun. 139.

Manager of an estate in the *West Indies* is not to give security faithfully to manage, but to account for produce, and to consign so far as the management requires it; but must have a discretion as to what is to be applied there. A receiver here gives security duly to account, not for faithful management. He cannot set, let, or make expenditures without application to the Court; a manager in the *West Indies* may.

RECOGNIZANCE.

How acknowledged.

[RECOGNIZANCES in this court are commonly acknowledged before a Master. *Vide Masters.*]

Leave granted to prosecute upon the recognizance

[In a cause at law there was bail and judgment, the defendant brought his bill in this court, and in order to obtain an injunction, did by order enter into a recognizance for hearing the cause, &c. and thereupon had an injunction, which he kept on foot a year; after which he surrenders himself at law in discharge of his bail. The defendant in this court then moved for leave to prosecute, upon the recognizance. Upon reading an affidavit of notice, it was granted; no defence being made on the other side.]

[One

[One of the clerks of the inrolments, or a deputy, is to attend the acknowledging, vacating, or cancelling all deeds and recognizances.]

An action at law will lie upon a recognizance; but if it is entered into in purſuance of an order of this Court, it cannot be ſued otherwiſe than by a *ſcire facias* in this court. How ſued. 1 Vern. 313

A recognizance was inrolled by ſpecial order of the Court, after the time for inrolling it was elapſed, the conuſor betwixt the date of the recognizance and the inrolling of it, borrowed money of *J. S.* upon a judgment, which was now over-reached by the recognizance, and the eſtate of the conuſor was in mortgage, prior to the recognizance, ſo that neither the recognizance nor the judgment could reach the eſtate without the help of equity—the Court inclined to give the preference to the judgment creditor. 2 Vern. 234. 1 P. W. 340.

A recognizance not inrolled to be taken as an obligation, and to be paid as a debt by ſpecialty. It may be inrolled after the time has elapſed; but it is done with caution, ſo as not to prejudice any intervening purchaſer.—A recognizance not regularly taken may be ſued as an obligation. *Inro'ment.* 2 Vern. 751. 1 P. W. 334. 1 P. W. 336.

Committee of an infant heireſs having given a recognizance, conditioned that he ſhould not ſuffer the infant to marry without the conſent of the Court: the form of this recognizance moderated, *viz.* "That the infant ſhall not marry with the committee's privity without the conſent of the Court." Though the Chancellor ſaid, he did not like to vary the rules of the Court; and that it might be difficult to prove, that the committee was conſenting. Form of recognizance. 1 P. W. 698.

If a creditor by judgment, ſtatute, or recognizance, buys in the firſt mortgage, he ſhall not tack it to his judgment, *&c.* becauſe he did not lend the money on the credit of the land, has no preſent right therein, nor can be called a purchaſer. 2 P. W. 491.

One taken upon a ſupplicavit and continued in priſon a year without any freſh threatening, diſcharged on entering into a recognizance before a Maſter in 100 *l.* with two ſureties in 50 *l.* each to keep the peace. *Supplicavit.* 3 P. W. 103, 104.

On motion that the ſecurity ſhould pay coſts and intereſt, from the time the recognizance was forfeited, Court refuſed to allow either intereſt or coſts againſt the ſecurity, or the principal. Bunb. 4, 5.

Where the offence was pardoned, the recognizance of the offender was discharged.

Bunb. 88.

RECORDS, PLEADINGS, ENROLMENTS.

VIDE

Injunction.
Decree.
Order.

Must be delivered to the Six Clerks.

[ALL pleadings, commissions, and certificates belonging to the Six Clerks to receive, shall, immediately upon the bringing in or return thereof into this court, be delivered to such Six Clerk's own hand as shall be attorney in the cause, or to the hands of his deputy in his absence: And no depositions or answers taken by commission, nor any commissions are to be opened by any of their under clerks, before they be so delivered.]

[Or. Ch. 107.]

Not copied till filed.

[No bill, answer, or other pleading, shall be copied by the clerk before the same be duly filed, and the hand of the clerk or his deputy be thereto put: and the clerk who delivers it to be copied, shall be adjudged equally faulty with him that copies it.]

Disobedience of under clerks.

[And if any disobedience in any of the under clerks of the said office appears herein; the Six Clerks shall present it to the Master of the Rolls: and if it be found true, such clerk shall be disabled to sit in office as an under clerk, or keep a desk there; and shall pay the party damnified his full damages and costs he shall be at thereby.]

[Or. Ch. 55.]

Not carried from the office till copied.

[No bills, privy-seals, warrants, pleadings, commissions, decrees, dismissions, injunctions, or other records, shall be carried out of the Six Clerks' office, to be copied or otherwise used, unless to a Master, or by order of the Court, or of the Master of the Rolls. But so soon as they are engrossed, enrolled, copied, or used in the office, they are immediately to be carried back to the Six Clerk.]

[Or. Ch. 46. 50. 107. 157.]

Not of record till filed.

[No bill, answer, or other pleading, shall be said of record, or of any effect in court, till it be filed with such

such of the Six Clerks, with whom it ought to remain.] [Or. Ch. 94.]

[The records of this Court, and a calendar of them, are to be transferred over from the Six Clerks to the Chapel of the Rolls; the clerks of which are to receive them there.] Transferred to the Rolls chapel. [Or. Ch. 50. 56.]

[Together with decree-rolls, are to be sent the paper-books, that are warrants for the same.] [Or. Ch. 64, 65.]

[One of the clerks of the enrolments, or a deputy, is always to attend the acknowledging, vacating, or cancelling of all deeds and recognizances.] Attendance of clerks. [Or. Ch. 34.]

[After acknowledgment, they ought in a few days to enrol them, and to carry the records over to the Chapel of the Rolls after two years from the time of enrolment.] Recognizances inrolled. [Or. Ch. 34. 150. 170.]

[No recognizance shall be enrolled after six months elapsed, except the Court see fit to grant it upon motion in open court.] [Or. Ch. 150.]

[The attorney in the cause, upon filing of any pleadings or record with him, shall by himself, or his deputy only, transfer the same to the attorney of the other side, or his deputy; without trusting any other clerk to do the same.] Records to be transferred to the adverse party, and by whom. [Or. Ch. 35.]

[19 *October* 1647. Two persons were by order of Court, committed to the Fleet for embezzelling the records of the Court.] Embezzelling records. [Or. Ch. 43.]

[One detaining the records and writings belonging to the office of a new examiner, was ordered at his peril forthwith to deliver them.] Detaining records. [Or. Ch. 74.]

[*The process and records of this Court, which relate to the proceedings in equity, are kept in several distinct bundles or on files.*]

[They are thus named and marked.]	[*And they contain.*]
[*The file of subpœna bills, and is called also the first part.*]	[Bills of complaint only.]
[*The file of bills and answers, which is called also the second part.*]	[Bills, answers, replications, &c.]

[And so every term hath a general part, which is called by the several progressive names of third, fourth, or fifth part. And the part and year is written

written on the back side of the torrel or cover of each part.]

[*The* corpus cum causâ, *or the mace bundle.*]	[Writs of *habeas corpus cum causâ*, and the bails taken upon the same; *certioraries*, with the certificate of any plaint, *&c.* from any city, town corporate, borough, or county court, there depending between party and party; as likewise all attachments with proclamation, commissions of rebellion, and transcripts of injunctions.]
[*The* scire facias *bundle, marked with the King's head.*]	[All writs of *scire facias*, &c.]
[*The file of* certiorari *bills.*]	[Wherein are all bills exhibited for *certioraries.*]
[*The close roll.*]	[On the back of which are contained all indentures, deeds, and recognizances, acknowledged in the Court of Chancery.]
[*The judgment roll*]	[In which are contained all judgments, decrees, and dismissions that are given in this court.]

REFERENCE

What. [IS an order of Court, whereby exceptions, contempts, irregularities, matters of account, and such like, are referred to a Master to examine, and make a report of to the Court, or whereby he is finally to determine or settle some matter.]

To whom. [The reference is commonly to one of the Masters sitting in the court when the matter is moved; but may upon motion and cause shewn be transferred to another.]

[Though

[Though in some cases references are absolutely necessary for the ease of the Court; as to cast up, state, and adjust accounts, peruse court-rolls, and other writings, which would take the Court up too much time, and hinder the dispatch of other business of more weight and importance; yet in many cases they occasion great charge and loss of time.] When necessary. [3 Px. Alm. 17. Pr. H. Ch. 53.]

[No reference shall be of the insufficiency of an answer, without alledging the special causes in the exceptions.] Special causes alledged. [Co. At. 445. 2. Toth. 49.]

[Some think it desirable, that the insufficiency of answers should not be referred, but that the exceptions should be at first openly argued in court; whereby those who now for delay only put in frivolous answers, or move to refer what perhaps they never read, would needs be more wary, for fear of giving the Court cause of offence: and the matter being thus determined at once, delays would be prevented. And they apprehend the Court would not find much more trouble than now, upon exceptions to Master's reports, and the suitors in general would be at less charge in their suits.] Opinion concerning the arguing exceptions.

[No reference upon a demurrer, or question touching the jurisdiction of this Court, shall be made to a Master; but such demurrer, &c. shall be heard and ruled in court.] In what cases. [Toth. 47.]

[Where the cause is gone so far as to examination of witnesses, no reference is to be made to any Master of the court, or to any commissioners to hear and end the matter, except it be in special cases of parties near in blood, or of extreme poverty, or by consent.] [Toth. 48.]

[The matter of a suit here may be, by consent, referred to arbitrators; and their arbitration will be in nature of a Master's report, and may be excepted to.] When made to arbitrators.

[A reference of the state of the case is to be sparingly granted, except by consent of the parties.] When by consent.

[Generally, matters of account (except in very weighty causes) are upon hearing turned over to a Master to examine and report, in order to a final decree, with some directions to the Master in what manner he shall proceed therein, and in making his report.] Matters of account. [Toth. 48.]

[The like course of reference is to be taken for the examination of court-rolls, touching any customs; Court-rolls.

but

but the copies shall not be referred to any one Master, but to two at the least.]

[Toth. 49.]

Before hearing.

[If both parties consent to an examination of accounts, to make the cause more ready for hearing, it may be granted.]

[Ibidem.]

Proceedings before the Master.

[The Master being shewn an order of reference, and the party who shewed it requesting, he grants his warrant of summons, whereby he appoints a time and place (his chamber commonly) for the parties to attend him thereon, (when and where they may come with their counsel, clerk, or solicitor, as they see cause,) which being served on the adverse party, his clerk or solicitor, by shewing it, and delivering a copy: if he attends not, the Master grants a second summons peremptory; when, if he attend not, the Master is to make his report *ex parte* of the other that attends.]

[1Px. Alm. 39.]

It is usual to underwrite all warrants, to shew for what they are taken out, and upon what to be attended, "*as that the plaintiff has left his charge*;" and after the first warrant to proceed on the plaintiff's charge, and the like: but the first warrant is seldom, if ever, attended upon by the adverse solicitor or clerk in court, because they are in general not furnished with office copies of the proceedings left with the Master.

2 Hair. 143.

[In an account, or taxing costs, before a Master, vouchers or proofs are generally expected for every thing that has not a kind of moral certainty, or violent presumption, or appears not of itself as a necessary concomitant or consequence of some other thing already proved or certain; wherefore copies, briefs, and papers in the cause of all sorts are to be carefully kept.]

[1Px. Alm. 39.]

[If, before the Master, either party [by his counsel, clerk, or solicitor] admit a matter of fact, the Master shall take a *memorandum* thereof in his book of minutes or *memorandums*, and the party admitting shall in his presence subscribe such minutes or *memorandums*; which subscriptions shall be conclusive to the party on whose behalf the same was so subscribed, so as the other side shall not be put to any proof of the matter.]

[Or. Ch. 201.]

[Money being paid into court here, upon obtaining an injunction to stay proceedings at law, the complainant offered the defendant here should have the money presently, and he would go before a Master with him to

to settle what more was due to him for principal and interest, and for costs here and at law, the report to be procured in a week, and the money reported to be paid in a week more; which the defendant agreeing to, the Court so ordered *ex assensu partium*, and that the defendant should upon receipt of the money acknowledge satisfaction at law, and the complainant should dismiss his own bill.]

Proofs to be made before hearing.

[By order 27th *February* 1667, parties are at their peril to make their full proof before publication: but if after hearing there be a reference to a Master for the stating an account, or such like matter, and he shall find any particular points or circumstances needful to ground his report upon, which are not fully proved, nor could properly be examined to before the hearing of the cause, he shall direct the parties to draw interrogatories to such points or circumstances only, and examine thereupon in court by the examiners, if the witnesses be or reside within ten miles of *London*; but if further off, and the parties desire it, he may direct a commission into the country, which is to be made out by the Six Clerks; and the publication shall pass according to the course of the Court in such cases.] [Or. Ch. 126.]

Master armed with a commission. 3 Vez. jun. 607.

[It seems the more common way now is, not to examine to a matter of account before hearing, but after, before a Master, if the witnesses be in town, &c. if not, then by commission to be directed by the Master, upon order for his being armed (as they call it) with a commission; though it should seem by the foregoing order he stands always armed.]

[Where a trust is confessed by the defendant's answer, there needs no further hearing of the cause; but a reference is presently to be made of the accounts, and so they are to go on to the hearing and stating of the accounts.]

Cause transferred to another master.

[A Master dying, the Court ordered, that the several matters referred to him should be transferred to another; and further ordered, that all books, papers, &c. that concerned the causes referred to the deceased, should be transferred to such living Master when demanded.]

Certificate from the Register of references.

[It was an ancient and useful practice, that the Register, within ten days after the end of every term, certified to the Lord Chancellor what references depended

pended in the hand of any Maſter, and how long they had depended; that ſo if any of them had depended over-long, the Court might require an account thereof from the Maſter, and quicken him to a diſpatch.]

[Com Sol. 44. Com. Att. 447.]

Solicitor's aſſent. 1 Ch. Ca. 86.

A ſolicitor's aſſent to interlocutories may bind, but not to a reference finally to determine.

Sums under 40 *s.* 2 Harr. 138.

In matters of account where ſums are forty ſhillings or under, then the party making an affidavit in writing before the Maſter (if the party lives in town, or if in the country before a Maſter Extraordinary) that ſuch ſums have actually been paid, the ſame will be allowed by the Maſter on the party's own oath.

2 Harr. 138.

No perſon is regularly to object to or defend the proceedings before the Maſter, upon taking accounts or taxing coſts, but ſuch of the parties as ſhall pay for an office copy of ſuch accounts, or bill of coſts from the Maſter.

Mortgage. 2 Keble, 376.

On a reference to a Maſter to ſtate an account upon a mortgage, all money paid as ſurety ſhall be reckoned as principal money from the time of payment, and intereſt to be allowed accordingly: and if lands in fee and for life be joined in mortgage, if the fee be not ſufficient at the time, the life ſhall be valued only as it was at the time, ſix or ſeven years purchaſe, and not according to the enjoyment ſince, be it twenty years or more.—*Per Bridgman* Ld. Keep.

Scandal, &c. Amb. 464.

If a bill be referred for *ſcandal and impertinence*, and ſo reported, exceptions taken to the report and allowed; the plaintiff ſhall have the coſts of the reference, but on exceptions to the Maſter's report of *irregularity* being allowed he ſhall not have coſts.

Award. 1 Bro. 398.

Where the matter in a cauſe has gone to a reference, the party cannot except to the award, but it muſt come on upon further directions.

Second reference. 1 Bro. 425.

If a reference to the Maſter was large enough to admit the ſtatement of all the circumſtances of the caſe, and no exceptions taken to the report, the Court will not grant a ſecond reference in reſpect of circumſtances which the Maſter may not have ſtated.

REGISTER.

[THIS officer is appointed by the Crown: under him are four deputies, who attend the Court in their turns, by two at a time.] By whom appointed.

[The Register's office is to note down, draw up, enter, and keep the decrees, orders, publications, and injunctions of this Court.] His office.

[The Registers are to be sworn, for the due execution of their office.] Sworn. Toth.

The Lords Commissioners of the Great Seal, 19th *April* 1660, ordered books and papers taken out of the office, and carried to another place, (pending a reference of parliament, touching the office of Register,) to be brought back to the office at *Symond's Inn*, without prejudice to the right of the parties.] [Or.Ch.70,71.]

Rules and attachments are to be entered in the Register's office, by one of the entering clerks. His office. 1 Harr. 77.

In his office are filed all reports from the Masters upon references, and all exceptions taken to any of the Masters' reports. Ibid.

All causes, pleas, demurrers, and exceptions are entered by the Registers in the paper; but they are not to enter any plea or demurrer, unless the order for it be brought to be drawn up at least *four* days after such order is pronounced for arguing such plea or demurrer, *&c.* and afterwards no alteration shall be made. 1 Harr. 77.

Minutes of decrees taken by the Registers are to be read in open court, that if there be any mistakes the counsel may speak for rectifying them, whilst fresh in memory: but this is seldom done now.

By stat. 12 *Geo.* 1. *c.* 32. two orders of the Court of Chancery, in the act set forth, are confirmed, and thereby (*inter alia*) it is directed, that all securities belonging to the suitors of the court, to be delivered out of the bank, are to be certified by the Register to the Master, what security is to be delivered out, together with the numbers, dates, and sums of such securities, and the names of the causes wherein the same is to be delivered out.

When stock is to be transferred to suitors, the Register is in like manner to certify. Ibid.

And

And when it is to be paid out of the bank, the chequer-note on the bank for payment muſt be counterſigned by the Regiſter.

REGISTER OF THE AFFIDAVITS.

[HIS office is to file all affidavits in this Court:] He makes copies of the ſame, which are ſigned by himſelf or his deputy; he alſo iſſues certificates under his or his deputy's hand, when required on any extraordinary occaſion.

2 Harr. 78.

Affidavits in this Court are generally to be filed before the ſame are exhibited or produced in court to ground any orders, writs, or motions, *&c.* likewiſe, copies are to be made by the Regiſter; and no counſel, clerk, *&c.* ſhall give any affidavit in evidence, which is not filed and regiſtered in the Affidavit-office.

Ord. Ch. 7.
2 Harr. 78.

[This office is granted by letters patent.]

RE-HEARING.

VIDE

Hearing.
Replication.

When.

[WHERE either party is not ſatisfied with the order made on hearing, upon his petition, ſhewing ſome cauſe for a re-hearing, ſigned by two or more counſel, one at leaſt of which was counſel in the cauſe, or is of good note in the court, ſignifying that they conceive there is good cauſe, the Court will, before the order is ſigned and enrolled, order it to be re-heard.]

[1 Px. Alm. 25.]

Petition, and to whom.

[If the cauſe was heard before the Lord Keeper, the petition muſt be to him; if before the Maſter of the Rolls, then either to the Lord Keeper or to him; but it is uſually to the former,] and now it is always ſo, whether the cauſe be heard before his Lordſhip or any

2 Harr. 647.

any of the Judges sitting for him, or before the Master of the Rolls: for whoever may have heard the cause, it is the Chancellor's decree, and must be signed by him before it is inrolled, which is done of course, unless a re-hearing be desired.

Stat. 3 G. 2. c. 30.

[Two days at least before the day appointed for re-hearing, the party appealing shall attend the Lord Keeper with a true copy of the order or decree appealed from, and of the petition upon which the re-hearing was granted, that his Lordship may be apprized of the order and decree, and the objections against the same.]

Lord Keeper attended with the petition and decree.

Or. Ch. 186.

[12th *May*, 1686, it was ordered, that no re-hearing or appeal should be granted, except the appellant should deposit *five pounds* in the register's hands, to recompense the other party in costs, if on such re-hearing he should not be relieved. But by a later order *ten pounds* was to be deposited: and by a *yet later order* twenty pounds is to be deposited.]

Deposit.

[The cause is commonly on the order appointed to be set down for such a day.]

When set down.

[If the twenty pounds be paid some convenient time before the day, (as four or five days,) it is said to be sufficient.]

Deposit, when paid.

[The granting a re-hearing shall not any way stop or hinder any proceedings on the order or decree appealed from, without the special order of the Court; but that the party in possession of the order or decree shall be at liberty to proceed therein, as if no re-hearing was granted.]

Proceedings not stopped by re-hearing.

[Cl. Tut. 38. Or. Ch. 167.]

[An order was had for re-hearing; but some opposition being afterwards made, and somewhat which was alledged as a cause for re-hearing, being referred to a Master; on his report the order was discharged: and the Court ordered five marks of the ten pounds deposited in the Register's hands for the re-hearing to be paid the plaintiff, in whose favour the decree had been made, for his charge of the motions and attendances.]

Deposit divided.

[Where a plaintiff, in a bill of revivor, omitted to pray process against one of the defendants, yet several motions being afterwards made in his name in the suit, and a commission executed in his name, and then a decretal order passed; this omission was held to be no cause for a re-hearing, the defendants having

In what case.

made this person a party by the proceedings, and all having submitted to it, his name must be used as a defendant to the end of the cause.]

[1 Ch. Rep. 252.]

The whole cause open.
1 P. W. 300.

On a petition to re-hear, the cause is open as to the whole and every part thereof with respect to the defendant; but with respect to the plaintiffs, it is only open as to those parts complained of in the petition.

New evidence.
Prec. Ch. 496.
Gilb. Rep. 150.
2 Vern. 464.

On an appeal from the Rolls to the Lord Chancellor, the appellant is at liberty to read new proof, and offer what he can against the decree. *Vide Prec. Ch.* 295. 1 *Vern.* 443.

Howard v. Colley, Trin. 11 Geo. 1.

But in another case it was determined, that on an appeal the whole case is open; but on a re-hearing, only so much as is petitioned against.

2 Atk. 408.

It has since been determined, that on an appeal from the Rolls, the appellant may read new evidence, provided he will give up his deposit.

How cause to be opened, upon re-hearing.
2 Atk. 50.

Upon re-hearing a cause which was originally heard before the Chancellor, it must be opened as a case.

After two years.
Amb. 89.

A decree *nisi*, and on defendant's not appearing, made absolute: two years afterwards the cause was ordered to be re-heard on terms.

Consent.
Amb. 229.

No appeal or re-hearing lies upon a decree made by consent. *Sed vide* 3 *P. Will.* 243.

Notice.
1 Ves. jun. 45.

Two days notice sufficient to apply for a re-hearing.

Petition.
1 Harr. 651.

If a matter of fact be mistaken at the hearing, it is to be set right by re-hearing, and not otherwise: but if it be a small mistake, it is sometimes rectified by petition to the Chancellor, or Master of the Rolls, who heard the cause; praying that all parties may attend the Register with the minutes, and that they may be rectified, which is done if the Court sees occasion.

3 P. Will. 8. note D.

Re-hearings are entirely in the discretion of the Court, and also what shall be done thereon; and the Court has refused, on the circumstances of the case, to discharge an order for a re-hearing, though at the distance of twenty-four years.

Perjury.
2 Vern. 463.

If, after hearing, a witness is convicted of perjury, advantage may be taken of it, on a re-hearing.

Caveat.
1 P. W. 609.

If, after a decree, a caveat be entered to stay the signing and inrolling, it stays the signing twenty-eight days; not only from pronouncing the decree, but twenty-

twenty-eight days from presenting it to the Lord Chancellor to be inrolled, and notice given by the Lord Chancellor's secretary to the other side.

If either party intends to re-hear the cause, the first step to be taken is, to enter a *caveat* with the Secretary of Decrees and Injunctions; and when the decree comes to be inrolled, the Secretary must summons the party upon his *caveat*, and give him notice that the decree is come to his hands, for the purpose of being inrolled by the Lord Chancellor. *Vide Appeal.*

Caveat.

1 Harr. 648.

For the form of the *caveat* and manner of entering it, see 1 *Harr.* 648.

REJOINDER,

[IS the defendant's allegation to the plaintiff's replication, whereby he endeavours to weaken the plaintiff's replication, and strengthen his own answer.]

What.

[West. Pr. sect. 195.]

[Therefore it must always pursue and confirm the answer, and sufficiently avoid and traverse every material point of the replication.]

[Ibidem.]

[If the plaintiff hath replied, the defendant may, if he will, rejoin *gratis*, and force the complainant to come in commission.]

Rejoinder gratis.

[Com. Att. 429.]

[But if the cause be not at issue, by reason of some new matter disclosed in the defendant's rejoinder that requires answer, the plaintiff may surrejoin; and so the defendant may ad-surrejoin, or rebut to the plaintiff's surrejoinder, if there be cause, which rarely happens, and is now seldom or never used.]

Surrejoinder, &c.

[If, after the cause is at issue, the complainant refuse to go to commission, the defendant may have one *ex parte* to examine his witnesses.]

Commission ex parte.

[Toth. 16.]

[The defendant having appeared upon the *subpœna*, to rejoin, or after the return and affidavit of service, and after the rule to rejoin is out, the defendant shall not rejoin, but the complainant may proceed to examination of witnesses.]

When the rule to rejoin is out.]

[Com. Att. 429.]

[A *subpœna* to rejoin against three; two are served; if the plaintiff proceed to examine, the party not

Examination.

Pr. H. Ch. 15. served shall not be concluded by these examinations, being no party thereto.]

Rejoinder, &c. disused.

According to the present course of the court, *rejoinders*, *surrejoinders*, *rebutters*, and *surrebutters* are disused. New matter offered by a defendant, in an answer, which formerly gave rise to a special replication, being by the present mode of practice introduced into the bill, by way of amendment, and a cause being at issue by the replication, a rejoinder is never actually filed.

Hind. 291.

It may not be improper to observe, that although a rejoinder is seldom or never filed; yet cases may arise, in which a rejoinder may possibly be necessary, as where a plaintiff in a cause has examined a witness *de bene esse*, and afterwards replied, without proceeding to serve a *subpœna* to rejoin, the defendant may immediately file a rejoinder, and compel the plaintiff to examine in chief his witness examined *de bene esse*, a neglect of which will render the depositions taken *de bene esse* nugatory, if the witness live long enough to be examined in chief.

Hind. 291.

Issue joined.

Wherever the replication is filed, although rejoinders are out of use, in order to close the *litis contestatio*, issue must be joined by assigning a probatory term to the defendant; and this is done by *subpœna*, requiring him to appear to rejoin, unless he will appear gratis. The effect of this process is merely to put the cause completely in issue between the parties. According to the modern practice, after the return of the *subpœna* to rejoin, (which by order obtained of course is now usually made returnable immediately,) the parties proceed to the examination of witnesses, to support the facts alledged in the proceedings of each side. For, after replication, the defendant may, if he will, rejoin *gratis*, and force the plaintiff to commission, or take it *ex parte*.

Hind. 293.

Replication.

No fruit shall be taken of any *subpœna ad rejungendum*, unless there be a replication first entered with and filed by the plaintiff's Six clerk in the cause, according to the course of the court, before the issuing out of the said *subpœna*, or at least before the return thereof; and the parties upon whom such *subpœna* shall be served, finding no replication so filed before the return thereof, shall have the ordinary costs taxed.

Or. Ch. 45 102.

The

The plaintiff having by his replication put the defendant's answer in issue; to support the points of his bill by testimony of witnesses, he must sue out and serve a *subpœna*, requiring the defendant to rejoin and join in commission. This writ may be made returnable on any day certain in term. It may be served by delivering the label to the defendant personally, shewing him at the time of service, the body of the writ under seal, or by leaving the body of the writ, under seal, at the defendant's dwelling-house, or place of abode, with one of the family. Hind. 294.

But the most usual method is to apply by motion in court, or petition to the Master of the Rolls, *for a subpœna to rejoin, returnable immediately, and that service on the defendant's clerk in court, may be deemed good service on the defendant.* This is entirely of course, and never refused. And in a country cause it is added, *that the plaintiff* may be at liberty to take out a commission for the examination of witnesses, [returnable without delay, with liberty to execute the same in term time,] with the usual directions:— Hind. 294.

Which are, that the defendant's clerk in court may, in four days after notice thereof, join in commission, and strike commissioners' names with the plaintiff's clerk in court; or in default thereof, that the plaintiff may be at liberty to take out a commission, directed to his own commissioners. Hind. 294.

R E N T.

VIDE

Receiver.
Injunction.

[SAID, where a party is by order of Court to be put into possession of lands, the Court will often, upon motion, order the rents to be in the meanwhile stayed in the tenant's hands. *Vide Motion.*]

REPLICATION.

What.

[IS the plaintiff's anſwer or reply to the defendant's anſwer.]

How drawn.

[The replication muſt be general, except the defendant, by his anſwer, offers new matter, which will not be brought into iſſue by the bill and anſwer, or that he denies only one or ſome few points.]

[Said, ſpecial replication and ſur-rejoinder are now out of uſe; and the plaintiff is to be relieved according to the form of his petition.]

[It muſt affirm and aver the bill to be true, and muſt confeſs and avoid, or traverſe and deny the anſwer.] [Pr. H. Ch. 14.]

[It muſt be ſhort, and touch the ſubſtance of the bill.] [Com. Att. 428.]

[And it muſt by no means be a departure from the bill; for the plaintiff muſt have his decree *ſecundum formam petitionis.*] Pr. H. Ch. 14.

[It muſt contain no new matter, except it be to avoid matter ſet forth in the defendant's anſwer.]

When not neceſſary.

[If upon the anſwer alone, without further proof, there be ſufficient ground for a final order or decree, the plaintiff ſhall proceed to hearing without replying, or examination of witneſſes; as, if the complainant makes his title by a will or other conveyance in the defendant's hands, and the defendant by anſwer confeſſes it.]

[But it is to be *noted*, that in ſuch caſe the anſwer will upon hearing be admitted true in every point.] [Toth. 55.]

[If it be needful to prove one or a few particular points, the plaintiff is to reply to thoſe points only, on pain of coſts for the copies, or otherwiſe, as the caſe ſhall require.]

[Where the defendant doth diſclaim, or doth not anſwer, but pleads or demurs, the plaintiff is not to reply: and if he doth ſerve the defendant with a *ſubpœna* to rejoin, the defendant may have coſts for the unjuſt vexation.] [Com. Sol. 28. Toth. 25.]

[Where a truſt is confeſſed by the anſwer, there needs nothing further but a reference of the accounts, and ſo they are to go on to the hearing of the accounts, *&c.*] [2 Toth. 50.]

[Though

[Though the plaintiff happens to need no witness on his part; yet it may be sometimes necessary to reply and put the defendant upon proof of somewhat in his answer; as, if he confesses the matter alledged by the plaintiff, but sets forth some further matter in bar of the plaintiff's equity.] [Px. Alm. 14.]

[If the plaintiff reply to an answer, and without rejoinder, or rules given for publication, bring the cause to hearing, the answer shall be taken wholly true, as if there had been no replication; for the defendant's opportunity of proving the answer is taken from him.] *Sed quære*, if it be an infant's answer.

Where, notwithstanding replication, the answer shall be taken to be true. [1 Ch. Ca. 21.] 3 P. W. 237.

[If the plaintiff go to hearing on bill and answer; and the Court shall not see cause to make a decree thereupon for want of sufficient matter confessed by the answer, the bill shall be dismissed with costs, or the plaintiff may be admitted to reply if he desires it, paying down five pounds, or such other costs as the Court shall think fit for the day, within four days after such hearing; which if he does not, the dismission must stand; and being signed and inrolled, may, as is aforesaid, be pleaded in bar to a new bill for the same matter, &c.] [1 Px. Alm. 14.]

Replication after hearing.

[The plaintiff hath all the term the answer comes in to reply.]

Time to reply.

[Said, in any following term, the defendant might give a rule to reply within eight days after, and within the term; which if the plaintiff failed to do, the bill might be dismissed with costs, without motion.]

[If no rule were given, then if the replication come not in before the end of the second term after the term the answer came in, upon a certificate thereof from the six clerk, the bill might have been dismissed with costs.] [Com. Sol. 28, 9.]

[But since the late act, whereby full costs are to be paid upon such dismission, it is said, the Court has indulged the plaintiff till the end of the third term, and that is now become the course of the Court in this matter.]

[But if a replication come in before the rule is out, or order for dismission pronounced, though it be after the end of the third term, the bill shall not be dismissed, nor shall the defendant have costs.] [Ibidem.]

[And though there be such a dismission for want of a replication, (or other proceeding,) yet the Court

does, for the moſt part, eaſily admit and order the bill to be retained upon paying coſts.]

[The rule ought to be given, (*i. e.*) entered in the houſe book (as they call it, which is kept in the office) eight days at leaſt before the end, and excluſive of the laſt day of the term, that is, it muſt be entered at leaſt the morning of the eighth day before the laſt.]

[This, as other rules, muſt be entered in term only.]

[After replication put in, if the plaintiff ceaſes all kind of proſecution for a year, the bill may, upon certificate and motion, be diſmiſſed.]

The plaintiff put matter in his replication which was not contained in the bill, and which he knew of when he exhibited the bill: defendant pleaded and demurred to the replication, which were allowed.

1 Ch. Rep. 259.

The ſignature of counſel is not required to a general replication.

Hind. 285.

Where there is a plea and anſwer, and the plaintiff replies; the replication muſt be to the anſwer as well as the plea.

2 Vern. 46.

Replication after hearing.

Decree againſt the defendant by default upon bill and anſwer, which, upon cauſe afterwards ſhewn by defendant, was altered in his favour. Plaintiff petitioned to re-hear, and at the re-hearing prayed leave to reply to the defendant's anſwer, and it was granted upon payment of coſts.

1 Eq. Ca. Ab. 43.

Effect of replication.

If plaintiff replies to the plea, he thereby admits it to be good, if it be true, and the validity of it can never afterwards be conſidered, but only the proof of it.

Prec. Ch. 58.
3 P. W. 94.

Replication nunc pro tunc.

Where witneſſes have been examined, and no replication filed, the Court at the hearing, or even after decree, will order a replication to be filed *nunc pro tunc.*

2 Vern. 46.
Moſ. 296.

Diſclaimer.

If defendant diſclaims generally, and plaintiff replies to the anſwer, and ſerves a *ſubpœna* to rejoin, the defendant is entitled to coſts.

3 Atk. 582.

Withdrawing replication.

The Court will not permit the replication to be withdrawn, except it be to enable the plaintiff to amend his bill, or ſome reaſon be ſhewn for the indulgence, becauſe otherwiſe it might be a contrivance to defeat the defendant of his full coſts, by getting the bill diſmiſſed at the hearing with forty ſhillings coſts only.

3 Atk. 565.

Quære, whether after plea or demurrer allowed to a ſpecial replication, the plaintiff can be allowed to file a general replication?

1 Vern. 351.

For the form of a replication, *vide Hind.* 285.

REPORT.

VIDE

Certificate.
Contempt.
Costs.

[A REPORT is a Master's certificate to the Court how the facts or matters referred to him by the Court to examine are, or do appear, or of somewhat which it is his duty to inform the Court of.] What.

[By ancient order, the Masters of the Court are required, that [upon a particular matter referred to them] they do not certify the state of the cause, as if they would make briefs of the evidence on both sides: but that they [ordinarily] do it with some opinion upon the matter.] Report not to contain a state of the cause. [Toth. 48.]

[By a later order they are not upon the importunity of any counsel whoever, or clients, to return special certificates to the Court, unless required by the Court so to do, or that their own judgment, in respect of difficulty, leads them to it.] He may, if he please, though the decree does not direct him, in taking an account state special matter. Special report. [Or. Ch. 118.] 2 Atk. 621.

[And, by the same order, certificates and reports are to be drawn as succinctly as may be, (reserving the matter clearly for the judgment of the Court,) and without recital of the several points of the order of reference, or the debates of counsel before them, unless that, in case where they are doubtful, they shortly represent to the Court the reasons which induce them so to be.] How drawn. [Ibid. Or. Ct.]

[The report must not ordinarily exceed the order of reference; but when the Court requires to be satisfied from a Master of any matter alledged to be confessed, or set forth in the defendant's answer, he is by the standing order of the Court, to take consideration of the whole answer; and to certify, not only whether the matter be confessed or set forth, but also any other matter avoiding that confession, or balancing the same; that so the Court may receive a true information.] Or. Ch. 118.

[Where

At what time made. [1 Ch. Ca. 179.]

[Where a time was prefixed the Master to make his report, and he made it after that time, it was disallowed.]

Report *ex parte.* [1 Pr. Alm. 39.]

[If the adverse party attend not upon a second summons, the first having been served, and he not having attended, the Master must make his report *ex parte* of him that attends and desires it.]

At what time made. O. S.

[If a report upon a reference for an insufficient answer be not procured and filed with the Register within a month after the date of such reference, the reference becomes absolutely void without motion or special order.]

When filed with the Register.

[All reports and certificates made and signed by any of the Masters, shall be filed with the Register within four days after making and signing; and the Register shall mark on the back thereof the day of its receipt and filing.]

If not filed proceedings thereon void. 2 P. W. 517.

[All proceedings grounded on such report or certificate not filed as aforesaid shall be utterly void; and the Register's certificate of such neglect shall be a good cause for the Court to discharge the proceedings thereon, and for such further costs against the party offending as the Court shall think fit.] It is however sufficient if it be filed before any proceedings had thereon, though not within four days after it was made.

How Master is to proceed and to hear both parties.

[Every Master to whom any accounts or other matter are by any order upon hearing referred, when he hath fully heard both parties, and prepared his report, shall at the request of either party, give out a summons, that both parties, or some for them, shall again attend him, who shall have liberty to peruse such report, or take a copy thereof. And if either party be dissatisfied, he shall in four days next after such attendance, bring in a note in writing of his exceptions thereto, and take out a summons to be heard thereupon; and then the Master is to settle and finish his report as he shall find just.]

Exceptions.

[After the Master has made his report, either party may take exceptions thereto, and have them argued in open court. But if upon hearing the exceptions in court it shall appear that the party excepting did not offer his *objections* to the Master, but depended on his appeal to the Court, and sought delay, though the exceptions happen to be allowed, yet the party for his

neglect, and occasioning trouble to the Court, and charge and delay to the adversary, shall pay such costs as the Court shall think reasonable.]

[Said, by a late order, if any exception, or distinct clause of an exception, to a report upon an account, &c. be overruled or waived, the party excepting shall pay twenty shillings for every such exception or clause overruled and declared frivolous, and for every such exception or clause waived and not opened ten shillings, though all the rest be allowed good.] Exceptions. Costs. Or. Ch. 168.

[Where a Master reports or certifies an irregularity in proceedings, there may be a reference to the Master, but no exceptions; for these matters used to be certified by the six clerks not toward the cause, and less credit is not to be given to a Master than to them.] No exception to a report of irregularity.

[After a report, whereon to ground a decree, signed by the Master, no order can be had to confirm it till it be filed with the Register, and notice of the filing thereof given to the other side a week at least before motion to confirm it, the other party having eight days from the service to except thereto.] Report must be filed before it is confirmed.

[If it be not to ground a decree upon, and is positive, it is to stand; and process may be taken out to enforce performance of the matter aimed at by the reference, as a better answer, &c. without further motion, unless the adverse party, upon notice to his attorney or clerk in court, that such report is filed, do in due time obtain some order of Court to controul or suspend the same.] In what cases confirmed. [Or. Ch. 120.]

[Such order of controul must be procured within eight days after notice of the report's being filed, if notice be given in term, or during the general seals after term; or it must be procured within four days of the next term, if the notice be given after the term and general seals.] [Ibidem.]

[Though the eight days be past, yet if it be but lately, the Court will sometimes on motion order exceptions to be received, and the party to procure a report in a short time.]

[Said, upon a dismission with costs to be taxed by a Master, you need no confirmation of his report, but may forthwith take a *subpœna* for them.] Report of costs not to be confirmed.

It is not usual to confirm reports of receiver's accounts. 2 Harr. 154.

[If an answer be reported insufficient, process for costs and a better answer may be immediately issued.] Or. Ch. 120.

[Said,

Must be served. [Said, a report of money due upon an account, and of most other matters decreed, must be personally served before it can be confirmed.]

Report confirmed *nisi*. [If a report be confirmed *nisi*, &c. and a party obtains leave to go back to a Master to review it, he must pay such costs as the Court shall think fit.]

Mos. 71. The cause cannot be brought on upon further directions, nor any motion made thereon till the report is confirmed, nor is any report after hearing valid, unless confirmed by order of Court; which on motion

2 Harr. 148. is confirmed unless cause; and if no cause be shewn in eight days after personal service, then upon affidavit of service, and taking the entering Register's certificate on such order, (which must be signed by any one of the Registers,) that no cause is shewn, on motion the report is confirmed absolute.

Where the order cannot be served personally, or the defendants are numerous and are dispersed, on

Ibidem. affidavit thereof the Court will order that service on the clerk in court be good service.

If plaintiff moves to confirm a report *nisi*, and defendant shews for cause, that he has taken exceptions, plaintiff too may except to the report notwithstanding

Mos. 305. his motion.

Reports are also confirmed upon consent in court by

2 Har. 149. the counsel of the adverse party.

Exceptions. [Where by special order the Court shall admit exceptions to be put into a report, whereby money is reported due, after the time such exceptions should have regularly been filed, no proceedings upon such report shall be stayed without giving security to pay the money, or bringing it into court, unless the Court shall provide otherwise by particular order.]

Not altered after confirmation. [After a report is confirmed, the Court will not easily (if at all) stir it upon pretence of an omission or mistake; for the parties had sufficient time to except to it, and if they will not mind their business, it is their own fault.]

Nor if confirmed by consent. [Much less will the Court alter it, if it was confirmed by consent of parties.]

How confirmed. [If the adverse party do not consent to the confirmation of a report, it will be ordered only *nisi causa*, &c. the next day of motions, or some other short day.]

Deposit. [If one appeals from a Master's certificate or report, he must file his exceptions thereto briefly with the Register,

gister, and depoſit five pounds with him, whereby proceedings are ſtayed till the exceptions be argued, &c.] Or. Ch. 120.

[If the Court do not alter the report, the five pounds ſhall be paid the party defending the report, (with ſuch further ſums as you will ſee under title *Exceptions*,) otherwiſe the five pounds is reſtored to the party appealing, who is to have the like ſum of the party defending the report.]

[Upon depoſiting five pounds, the Regiſter gives a certificate thereof, for which he has one ſhilling.]

[Upon motion, and producing the certificate, that exceptions are filed, and five pounds depoſited, the Court will order a ſtay of proceedings, and appoint a day, commonly the next of exceptions, for hearing thereof.] Com. Dig.

[For a report before hearing you are to pay the Maſter fifteen ſhillings.] Fees to the Maſter.

[For a report after hearing, five and twenty ſhillings.]

[The Regiſter ſhall enter ſuch cauſes of appeal in a paper in order as they are brought to him, to be determined by the Court in courſe upon days of motion, (or exceptions rather,) and notice thereof is to be given to the clerk on the other ſide; and the Regiſter is to ſet up a paper of ſuch cauſes, two days before the day for arguing ſuch exceptions.] Exceptions to be entered by the Regiſter. [Or. Ch. 120.]

[If after a report is confirmed *niſi cauſa*, a party upon motion, has leave to go back to the Maſter, for him to review it; he muſt pay forty ſhillings, and further coſts to be taxed, if the report happen to be affirmed.] Coſts upon the Maſter's reviewing his report.

[If a Maſter report a beſt purchaſer, and the report is confirmed *niſi*, (as it always is before it be made abſolute,) if the adverſe party be not ſatisfied, the Court, on motion, will generally ſend them back to the Maſter for a few days, as fourteen or ſo, to ſee if a better purchaſer can be found.] 2 Harr. 150.

Exceptions cannot regularly be taken to a report after hearing, unleſs objections have previouſly been taken to the draft of the report, which the Maſter prepares, and at the requeſt of either party iſſues a warrant that the parties attend him, peruſe the draft and take copies of it; and after that, either party may again attend and take out a warrant returnable in four days, *at which time the Maſter will ſign his report*, which Objections. 2 Harr. 146.

muſt

must be under-written upon the warrant; and he will accordingly sign it, unless objections are then delivered.

The same evidence as before the Master.
2 Harr. 147.
2 Atk. 21.
2 Atk. 408.

Upon arguing exceptions to the report no evidence can be read, which was not produced to the Master upon the objections, nor will the Court order the Master to review this report, unless the exceptant gives up the deposit.

Objections.

Where a defective account is carried in before the Master, objections should be taken to the draft of the report, for the Court will not afterwards make an order thereupon.

2 Harr. 147.

Service.

There is no occasion to serve a report.

2 Harr. 150.

Exceptions how drawn.

Exceptions, to the report that the bill (which had been referred for impertinence) was pertinent, without specifying the parts which were impertinent; the generality of the exception does not prevent the exceptant pointing out particular passages. *Sed vide* 2 *P. Will.* 181. *contra.*

2 Atk. 182.

1 Bro. 577.

Exceptions will not lie to a report of maintenance.

3 Atk. 689.

The Court will not determine, upon motion, matters which have been reserved till after the report.

2 Ves. jun. 69.

Before report, the Court refused a motion to order the balance of charges allowed against defendant upon account, without any deduction in consequence of defendant's discharge to be paid into court, upon certificate by the Master, and defendant's examination before him, for there must be a report in order to take notice of any thing in a Master's office; but the Court would not let the certificate be taken off the file.

RULES.

What.

[THE general orders of the Court are sometimes called rules of the Court. But,]

[What is generally called a rule, seems to be a particular order of course, founded upon some general order, or the common course of the Court, entered without petition or motion, touching the ordinary proceedings in a cause; as, to answer, to join in commission,

fice, to reply, to rejoin, to produce witnesses, to examine them, and such like.]

[All rules are to be entered in the common book, called the house-book; and on entering thereof, notice shall be from time to time given to the under-clerk on the other side, that is towards the cause; that the client be not surprized. *Vide Publication.*] How entered. [Or. Ch. 237.]

[Rules are to be entered in term time only.]

SCANDAL.

VIDE

Report.

[SAID, if any thing be alledged in a bill, answer, or other pleading, in such language as is unbecoming the Court to hear, or as is contrary to all good manners; or if any thing be set forth, which chargeth some person with a crime not necessary to be shewn in the cause; it is accounted scandal, and indeed in the last case, there seems both scandal and impertinence: for impertinence is the setting forth somewhat not necessary; which, if in any considerable degree, either as to length or quality, is, when complained of and reported to the Court, to undergo the same fate as scandal, *i. e.* to be expunged, with payment of such costs as the Court shall see cause to inflict.] What.

Impertinence is where the pleadings are stuffed with long recitals, or with long digressions of matters of fact which are altogether unnecessary, and totally immaterial to the point in question; as, where a long deed is stated, which is not prayed to be set forth *in hæc verba*; or, where a bill of revivor sets forth *in hæc verba* not only the original bill and answer, but the whole proceedings in the cause, for they ought to be set forth very short. Impertinence. 1 Harr. 102.

In all cases where the Master reports the matter referred to him scandalous, the Court will order him to expunge it from the record, and give the party costs for the vexation; and though the costs are only awarded Must be expunged. 1 Harr. 103.

Where the suit is for lands.

[If the suit be for lands, the sequestration sometimes orders the profits to be delivered the plaintiff; and the Court sometimes also orders him an injunction for the possession of the lands, till further order; and commands the Sheriff to put him into possession.] *Vide* 3 *Vez. jun.* 23.

Of what granted.

[It was the ancient course, where a decree was made for rent to be paid out of lands, or a sum of money to be levied on the profits of lands, to grant a sequestration of the same lands, being in the defendant's hands.]

[Toth. 46.]

[And it hath been said, that a sequestration is not to be granted of lands that have no relation to the thing in demand; but practice is against it.]

[Toth. 175, 6.]

[And, you often have a sequestration of both lands and goods, where the thing decreed is a personal duty.]

[1 Ch. Ca 92.]

[If the sequestration be after a decree for money, it is usual to grant it of the lands, out of which, *&c.* and of all other the party's real and personal estate; the rents and profits to be paid the party to whom the money is decreed, till the money and costs are satisfied.]

Injunction for possession.

[If the decree be of lands also, the Court grants an injunction for the possession of the lands.]

Granted for money in others hands.

[A sequestration hath been sometimes granted for money of the parties, in other men's hands.]

[Toth. 173.]

Of what granted.

If a prebend has a distinct corps, it may be sequestered, but not where he is only a member of the body aggregate, and the inheritance is in the dean and chapter.

Salk. 320.

He who obtains a sequestration against a man injuriously dispossessed, cannot by virtue of that title sue the wrong-doer, for a right of action cannot be sequestered. *Sed quære.*

MS. Lord Nottingham. 221.

Injunction for possession.

[Said, where the defendant sits out all process of contempt, and cannot be found by the Serjeant at Arms, or resists the Serjeant, or makes rescous; a sequestration shall be granted of the land in question: and if the defendant do not render himself within the year, then an injunction shall be granted for the possession.]

Bill taken pro confesso upon a *nichil* returned on the writ. 1 Vern. 247.

[Or if the defendant hath once appeared, and afterwards being in contempt, a *nichil* is returned upon this writ, before hearing, the Court on petition or motion, and producing the writ so returned, will order the cause to be set down to be heard; and at the day for

for hearing, the bill being read, the Court, in regard of the many and great contempts of the defendant, and of the ſtrong preſumption the bill is true, will take it *pro confeſſo*, and decree for the complainant, according to the prayer of the bill; ſo that he pray nothing apparently contrary to equity.]

[Said, this proceſs is like an outlawry at common law, ſo that, if a defendant who cannot be found to ſerve proceſs upon, is proceeded againſt to a ſequeſtration, and does not then appear, you may proceed againſt the reſt.] Outlawry. [1 Ch. Ca. 139.]

[Where proceſs is carried on to a ſequeſtration againſt lands of the father; he dying, it may be had againſt the ſame lands in the hands of the heir.] Againſt lands of the heir. [1 Ch. Ca. 241.]

[It hath been held otherwiſe, where the decree was for a perſonal duty only.] Perſonal property. [2 Ch. Rep. 244.]

[Where lands of the huſband, out of which an annuity to the wife iſſued, were ſequeſtered; the huſband dying, the ſequeſtration was diſcharged, as to the annuity.] Baron and feme. [1 Ch. Rep. 247.]

[If a party does not obey a decree, proceſs of contempt may iſſue againſt him; and if not taken, the Court will grant a ſequeſtration.] To enforce a decree.

[So if he be taken and lie in priſon, obſtinately refuſing to perform the decree.] [1 Ch. Ca. 92.]

[A voluntary and fraudulent conveyance, to avoid an approaching ſequeſtration for a perſonal duty, is no bar to the ſequeſtration.] Voluntary conveyance no bar. [2 Ch. Ca. 46]

A ſequeſtration *niſi* is the firſt proceſs againſt a peer or member of the Houſe of Commons; and it is good cauſe, where it is for want of an anſwer, to ſhew that the anſwer is in; if the anſwer be reported inſufficient, the plaintiff muſt begin *de novo* for a ſequeſtration *niſi*; but the Court will enlarge the time for ſhewing cauſe till after the Maſter's report. Againſt a peer. 2 P. W. 110. 385. Comb. 62. 3 Atk. 740.

A ſequeſtration has been granted againſt an *infant* peer for not appearing, and the ſequeſtrators received the rent. 2 Ch. Ca. 163.

An order for a ſequeſtration being a judicial act, muſt be founded upon a proper affidavit. Gilb. Eq. Rep. 178.

This proceſs having become by long uſe and acquieſcence the legal and ordinary proceſs to enforce obedience to the decrees and orders of the Court, it will not be neceſſary to diſcuſs the origin and introduction of it. It may be ſufficient to refer the reader to the caſes in the margin. Origin of this proceſs. Mod. 259. 1 Moor, 549. Cro. Eliz. 651. 2 Mod. 258. 2 Ch. Ca. 44. 2 P. W. 621. 1 Vern. 421. 1 Ch. Ca. 91.

Effect of this process.

A sequestration out of Chancery is more effectual, than a *fieri facias* at law: for a sequestration may be awarded against the goods, though the party be in custody upon an attachment: whereas at law, if a *capias satisfacere* be executed, a *fieri facias* cannot issue.

Ca. temp. Talb. 222.

From what time it binds.
1 Vern. 58.

A sequestration binds from the time of awarding the commission, and not only from the time of executing it; for otherwise the inferior officer would have *ligandi et non ligandi potestas.*

Abatement.
2 P. W. 6[illegible]1.
1 Vez. 182.
1 Ch. Rep 247.
1 Vern. 118.
166.

A sequestration, whether it issues as mesne process of the Court, or in performance of a decree, abates by the party's death; (*contra* 1 *Vern.* 58. 3 *Atk.* 594.) and cannot be revived against the heir of the defendant, except in cases, in which the heir is bound.

2 Ch. Ca. 46.
Barn. 431.

Quære, whether it can be revived against the heir of a copyholder?

MS. Lord Nottingham.

Sequestration against tenant in tail determines by his death.

Prec. Ch. 99.
Where one defendant does not appear.

If a necessary defendant be prosecuted to a sequestration, the plaintiff may go on without him against the other defendant.—And where one defendant being out of the kingdom could not be compelled to appear, it was held to be equal to his having been proceeded against to a sequestration, and the decree awarded against the other defendant, who was his partner.

2 Atk 510.

Corporation.

But after service of a writ of execution of a decree against a corporation, the next process is a distringas, and after that a sequestration, which being once awarded, the corporation can never afterwards enter an appearance, as on the distringas it might have done.

Prec. Ch 128.

One defendant in contempt.
1 Vern. 228.

One of the defendants being in contempt, and standing out to a sequestration, the cause was heard against the other defendants; yet upon his coming in and answering, the cause was heard against him.

Warden of the fleet.
Mos. 238.

A sequestration was awarded against the Warden of the Fleet prison, for not answering; he being supposed to be always present in court.

Where goods sequestered are not sufficient.
Mos. 246.

If the goods sequestered are not sufficient to satisfy the plaintiff's demand, he may move to revive the order for a Serjeant at Arms.

Defendant in the Fleet.
Mos. 301.

On the return of an attachment for non-performance of an order against one in the *Fleet*, the next process is a sequestration.

Of what granted.

In Chancery, not only the defendant's body, but also his lands and goods are liable to a sequestration; but

but no sequestration lies till the time for the return of the attachment is out on which the body was taken; for until the return of the writ, it is uncertain whether the defendant will pay the money or no; and it is reasonable that a sequestration should lie against one in custody by process out of Chancery, who continues in prison without paying his debts. 1 Ch. Rep. 151. 2 Ch. Rep. 151. 3 P. W. 240.

A sequestration must be returned, before any motion can be made to discharge it, on the death of the party, as to the lands sequestered. Discharged. Bunb. 31.

After goods or a real estate have been sequestered for want of an answer, the plaintiff may still proceed till he has got the bill taken *pro confesso*, Pro confesso. 1 Ven. 247. 2 Atk. 23. Bunb. 272.

Where a defendant, for want of an answer, has stood out to a sequestration, and the bill taken *pro confesso* against him on a decreee *ad computandum*, the Court will not discharge the sequestration on payment of costs of the contempt only, but will keep it on foot as a security to the plaintiff for the defendant's appearing before the Master to take the account. 3 Atk. 468.

Sequestrators are officers of the Court, and are to act as the Court shall direct; and to account for what comes to their hands, and are to bring the money into court according to order, to put it out at interest, or otherwise as shall be found necessary: and this money is not usually paid to the plaintiff, but is to remain in court till the defendant hath appeared or answered, and cleared his contempt, and then whatsoever has been seized shall be accounted for and paid over to him; if the Court, in whose discretion the whole is, shall so direct. Sequestrators. 4 Bac. Abr. 427.

Plaintiff may obtain an order for tenants to attorn and pay their rents to the sequestrators, or for the sequestrators to sell and dispose of the goods of the party, and to keep the money in their hands, or bring it into court, or otherwise, as the Court pleases. 4 Bac. Abr. 427.

An injunction was awarded against tenants who refused to pay their rents to the sequestrators. 2 Ch. Ca. 163.

Sequestrators on *mesne process* are accountable for all the profits, and can retain only so far as to satisfy for the contempts. 1 Vern. 248.

If sequestrators, having power to fell timber, dispose of 7000*l.* worth, and only bring 2000*l.* to account, the plaintiff is not responsible, for the sequestrators are the officers of the Court. 1 Vern. 161.

Sequestrators in possession, the Master was ordered to allow a tenant, the sequestrators to make a lease, and the tenant to enjoy.

3 Ch. Rep. 87.

Sequestrators for want of appearance, after seizure of the goods ought to apply to the Court for further directions. Sequestrators for want of an answer, have no power to sell or remove goods, and if they do, an attachment lies against them.

Bunb. 272.

Their fees.

The Court will not order a sequestrator his fees, who has made no return of the goods sequestered, but delivered them over many years since and made no demand upon the plaintiff; but if plaintiff seeks an account of goods sequestered, the sequestrator may set off his fees at any time, if he has from time to time made a return of what he has seized.

3 Atk. 594.

The costs of a sequestration are taxed by the Master. Sometimes the sequestrators are allowed poundage, or 6*s.* and 8*d.* a-day, and expences, or a gross sum, as the Master pleases.

2 Atk. 542.

Sequestration in Ireland.

The Court of Chancery in *England* may grant a sequestration against the defendant in *Ireland*, but not till after a sequestration in *Ireland* and *nullabona* returned.

1 Vern. 135.
2 P. W. 261.

Defendant abroad.

Upon affidavit that the defendant was gone to *Holland* to avoid the plaintiff's demand, and he having been attached, and a *cepi corpus* returned, the Court granted a Serjeant at Arms, and upon return thereof, a sequestration.

1 Vern. 344.

Examination pro interesse suo.

Any person who claims title to the estate sequestered may move, as of course, to be examined *pro interesse suo*, without filing a bill, and the plaintiff must examine him upon interrogatories, and the Master state the matter to the Court, and the parties may enter into proof, and when the Master has made his report, the Court gives judgment upon the subject.

4 Bac. Abr. 427.

Where goods may be sold.

The Court refused to order 11 hogsheads of cyder to be sold under a sequestration upon *mesne process*.— But where the sequestration issues for nonpayment of money, though it be upon *mesne process*, the goods sequestered may be sold.

Amb. 421.
3 Bro. 72.
1 Ves. jun. 86.
3 Bro. 362.

Perishable commodities, rents paid in kind or the natural produce of a farm, may be sold under a sequestration; but there is no instance of an order to sell under a sequestration, a subject, which passes by *title*, and not by *delivery*.

3 Ves. jun. 23.

Papers had been delivered for the purpose of being examined, and an order obtained for their restoration, the

the order was served, but no writ of execution of the order taken out, a sequestration *nisi* was granted. 1 Bro. 434.

The first motion for a sequestration for nonpayment of money is *nisi*.

An order for a receiver discharges a sequestration. Receiver. 1 Ves. jun. 24.

A sequestration will reach a purchaser, who comes in *pendente lite*, if he be a purchaser of the thing in demand, but not otherwise, else there can be no dealing with any man who has a suit in Chancery. Purchaser. MS. Ld Nottingham. 225.

A purchaser of the thing not in demand, whether it be of land or goods, is bound by the sequestration, if his purchase were after the *teste* of the commission for sequestration, or after the date of the order for that commission. MS. Ld. Nottingham. 225.

SERJEANT AT ARMS, AND MESSENGER.

[THIS officer of Serjeant at Arms is by patent from the Queen, for life. Besides his casual fees, he has one certain fee of twelve pence *per diem* allowed him.] By patent.

[His office is to bear a gilt mace before the Lord Keeper, in going to or returning from court or parliament; and to execute all warrants granted against any person, after he has stood out a commission of rebellion; or to bring up, by order of Court, any one that is in custody of a Sheriff or other officer, who has returned a *cepi corpus* upon a process of this court, and brings not in the party; and to take into custody any other person upon an order of this court.] His office.

[Said, the Court may, if there be cause, send this officer to bring in a defendant to appear, instead of issuing a *subpœna*.]

[He has several deputies; some of whom are used as and called messengers, (as is said,) before a commission of rebellion; others upon or after a commission of rebellion, and are called by the name of their superior.] [3 Px. Alm. 23.] Messengers.

[A party in custody of the Serjeant at Arms, or messenger, upon some contempt, prayed to be turned over to the warden of the Fleet; because he lay in the hands of the officer at so great an expence; 13*s*. 4*d*. *per diem*; and it was granted him.] Warden of the Fleet.

[When a defendant is taken upon process of contempt, and the Sheriff returns *cepi corpus*; the party lying in prison, or the Sheriff refusing to bring him in, the Court will order a Messenger (if desired) to take the prisoner into his custody and bring him in.]

Messenger.

[Cl. Tut. 54.]

[The Court refused to order a Messenger to *Durham*, which is two hundred miles or more, on the return of a *cepi* on an attachment; because of the great distance and expence: but said, it is used to be granted as far as *York*.]

[Upon an information, that *A.* and *B.* two necessary witnesses, absented themselves, so as not to be found to be served with process; a Messenger was granted to bring them in.]

[Prac. H. Ch. 148,-9]

How obtained.

The next process, after a commission of rebellion, is a Serjeant at Arms; which is granted on motion, upon the return of *non est inventus* upon a commission of rebellion, and when a Serjeant at Arms is moved for, upon a commission of rebellion returned, the commission of rebellion is always produced, and is in the hands of the counsel, who makes the motion, and he delivers it to the Register.

3 Atk. 570.

1 Harr. 250.

Before a sequestration can issue, a *non est inventus* must be returned by the Serjeant at Arms, unless the party be a peer or peeresses of the realm, a member of the House of Commons, or an absconding defendant proceeded against according to the stat. 5 *G.* 2. *c.* 25.; and this, that the Court may be satisfied, by the *non est inventus* being returned by its own officer, that the contumacy of the defendant is wilful, and the consequence of his own default.

1 Harr. 250.

Fees.

The order for a Serjeant at Arms shall be drawn up by the Register, and delivered at the request of the Serjeant at Arms to him or his deputy, and is not to be discharged, nor the contempt thereupon, without the Serjeant's fees be paid, and a certificate under his hand, testifying the same.

Or. Ch. 4 Nov. 26 Car. 2. 13 July. 1 Jac. 2. 1685. 12 July. 6 W. 3. 1694.

Sequestration.

It was ordered, that where any person was in contempt, for want of an appearance or answer, or for not yielding obedience to any order or decree of this Court, (unless for contemptuous language, or the beating or abusing any person in the service of the process of this Court, or other contempts of a like nature,) the Serjeant at Arms shall apprehend and bring the contemner to the bar of the court, to answer such

Or. Ch. May 13. 7 Geo. 1.

such contempt; but if the contemner cannot be found, then to return *non est inventus*, to the end that a sequestration might regularly issue, according to the ancient usage and practice of this court.

It was also ordered, that it should be made a part of all orders for giving time to answer, or for doing any other act, upon the party's entering an appearance with the Register; that the party, when he enters such appearance, should likewise consent that a Serjeant at Arms should go against him, as upon a commission of rebellion returned *non est inventus*, in case of non-compliance. For the reasons for making these orders, *Vide Prec. Ch.* 553. Or. Ch. May 13. 7 Geo. 1.

The order for a Serjeant at Arms being drawn up, passed, and entered, the clerk in court or solicitor gives it to that officer, who procures a warrant thereon, signed by the Lord Chancellor, and at the return thereof certifies in what manner he has acted under it. 1 Harr. 253.

Sequestration

The return which he makes upon the back of the warrant must be *filed* at the report-office, before a sequestration can regularly issue. 3 Atk. 569.

Costs.

The costs are to be taxed by the clerk in court, for the plaintiff and defendant, and are according to the distance the Serjeant at Arms has to seek the party: and the party taken upon this process must clear his contempts and pay his costs before he can be released; and, if it be in execution, he must be detained in custody and brought into court, and upon motion, committed to the Fleet until he perform the decree. 1 Harr. 253.

SHERIFF.

Oath.

[THE parts of his oath, which seem principally to concern him, considered as an officer of this court, are—To do right to all, as well poor as rich, in all things belonging to his office—Truly to serve and return all the Queen's writs—To receive no writ unsealed; nor any sealed, except by justices having authority to make writs unto him by the law of the land.]

[Said,

[Said, every Sheriff is an officer of this court, and bound to serve attachments, and other process of the Court directed to him.]

May be amerced. [Cary Rep. 109.]

[He may upon any neglect be amerced; as for not returning a writ, or not bringing in a prisoner by a day given him upon a *cepi corpus* returned by him.]

Neglect. [Cary Rep. 62.]

[Where he had returned a *non est inventus* upon an attachment against one, who is a justice of peace, and who was at the last quarter sessions for the same county, the Court amerced him five pounds.]

[So for a false return, as where upon an attachment he returned *cepi corpus* and *languidus*, a *duces tecum* was awarded, and thereupon he returned *adhuc languidus*.]

[An affidavit being made, that the defendant, neither at the time of the return or since, was sick, but goes abroad; the sheriff was amerced *five pounds* for his false return.]

[A Sheriff amerced for not returning attachments, upon affidavit that they were now returned and delivered to the party prosecuting, moved the Court to discharge the amercements, which were not yet estreated; and it was granted.]

Not to take any reward.

[Sheriffs and other ministers ought to take no reward or other thing for doing of their office, but only of the King, or that which is appointed for them to take, by the statutes and laws of this land; and if they do otherwise, it is extortion in them: and if any sheriff or any of his officers, &c. shall do any extortion, and be thereof attainted, either at the suit of the King or of the party, he shall yield twice as much as he took, to the party grieved; and besides, he may be indicted thereof before the justices of gaol delivery, or justices of peace, and by them punished, (*scil.*) he may be fined to the King. See the stat. 3 *E.* 1. *ca.* 26. 20 *E.* 3. *ca.* 6. and 1 *H.* 4. *ca.* 11.]

Co. Lit. 368.

Writ excomm. capiendo.

Where a prisoner who had been in *Newgate* for debt and removed to the *Fleet* was excommunicated, the writ of *excommunicato capiendo* is not to be directed to the Warden of the Fleet, but to the Sheriff; who may return a *non est inventus*, on which the Court of *B. R.* may grant a *habeas corpus*, and thereon charge him with an *excommuni. capiendo*.

3 P. W. 54.

The writ of *excomm. cap.* is a *viscountiel* writ; but where the Sheriff is a party, or otherwise incapacitated, it must be directed to the Coroner.

SOLICITOR

(*Vide Witness*)

[IS a person that solicits and manages causes in this court for suitors.] What.

[In a town cause he is very useful, if the party is not much at leisure to solicit it himself, and pretty dexterous, and have besides a good under-clerk in court.] His use.

[In country causes, if there be the least difficulty or struggle in them, or if they be of any moment, solicitors seem to be absolutely necessary to the good management of them.]

[Though you pay him some term fees when little is done; yet, if you have an honest dexterous man, he saves you abundantly more other ways; besides dispatching, and often saving your cause.]

[He sues out your process, takes care that your bill, answer, interrogatories, &c. be well drawn; he abbreviates your pleadings and proofs; attends counsels, courts, masters, &c.; sees to the drawing up orders, decrees, &c.; and does every thing in your cause that does not belong to some certain persons or officers to do.]

[No agreement made between any of the clerks or solicitors of this court, relating to their client's causes, shall be of any avail, unless such agreement or some note or *memorandum* thereof be put into writing, and subscribed by the party that is to be bound thereby. *Vide Reference.*] Authority. [Or. Ch. 165.]

[Held, that though the solicitor's assent in court to interlocutories may bind the client, yet it binds not to the final reference to a determination of a private person.] [1 Ch. Ca. 86. 1 Ch. Rep. 196.]

[Said, the client is bound by an agreement, or confession signed by the solicitor before a Master, except there appear fraud or practice. *Ex rel.*]

[The Court on motion or petition will order a solicitor's bill to be taxed by a Master: and if on payment, or tender and refusal of what is taxed, he refuses to deliver his client's writings according to the order, the Court will grant an attachment against him.] Solicitor's bill.

[But money paid before the taxation, will not make a good payment of any part of what is taxed; because that Bill taxed.

that ſhould have been ſhewed before, and would have been allowed by the Maſter, in the taxation.]

[A ſolicitor delivered his bill, does buſineſs after, brings his action at law, and has judgment; the defendant brings error, the writ of error is ſpent; the defendant prays here to have the bill taxed; and the Maſter taxes only coſts of this court, nothing being offered by the ſolicitor of his coſts at law; the Court was about to order, that on payment of fifteen pounds, the coſts taxed by the Maſter, the ſolicitor ſhould deliver up writings, *&c.* for it was his own fault that he attended not the Maſter, nor charged the reſt: but at length, upon the ſolicitor's paying forty ſhillings coſts, the parties were ſent back to the Maſter, who was alſo to tax the coſts at law, and what had ſince accrued, for buſineſs done in the court after the bill delivered.]

[The report to be made in a week, and proceedings at law to ſtay.]

[But ſaid, it is more regular, that the coſts at law be taxed by the proper officer there; and then brought before the Maſter.]

Contempt.

[18 *December* 1674. A ſolicitor was committed cloſe priſoner to the Fleet, for cauſeleſsly and without provocation (ſave the expediting an order againſt his client according to the direction of the Court) ſtriking off the hat of a clerk in the Regiſter's office, and beating him on the head and face with a cane.]

[Or. Ch. 152.]

Executor of a ſolicitor.

[The Court takes the ſame courſe with an executor or adminiſtrator of a ſolicitor, as with the ſolicitor himſelf, for detaining writings on pretence of fees due.]

Bill taxed.

[Upon petition, a ſolicitor's bill was ordered to be taxed; the ſolicitor moved (though it was ſaid he ought to have petitioned, becauſe the matter came in by petition) to diſcharge the order, upon affidavit that there had been a running account between the client and him, ſome of the money being lent, and ſome for buſineſs; that an account of the money had been given; and that the reſt for buſineſs was as *per* the *items* in the ſolicitor's book, which had been ſhewed the client; and the whole account had been agreed to and ſigned, and the vouchers delivered up; and ſo prayed that the account might not be ſtirred, *&c.*; but the Court was ſo far from diſcharging the order,

order, that it ordered it should stand, and the solicitor to pay the costs of the motion, out of what should be coming due to him: and ordered the vouchers to be produced before the Master upon oath.]

[A plaintiff having a decree for money, his solicitor without order from him, received it. The plaintiff, not knowing this, proceeds. On complaint, the solicitor was ordered to pay back the money with interest, costs, and charges.]

Solicitor to pay costs.

[2 Ch. Ca. 38.]

[No Master's or examiner's clerk is to be concerned in the managing or soliciting any cause, under pain of suspension and commitment.]

Master's clerks.

[Or. Ch. 256.]

A man may have a bill for fees due to him as solicitor, if for business done in this court; and so he may, where the business is done in another court, if it relates to another demand which he makes in this court.

Bill for fees.
1 Vern. 203.

To such a bill however, a plea of the statute 3 *Jac. c.* 6., that the plaintiff has not signed his bill, is good.

Stat. 3 *Jac. c.* 6.
Plea.
1 Vern. 312.

Demurrer, to a bill by an executrix of an attorney, to be paid his bill for business, allowed; as there is remedy at law, 2 *Geo.* 2. *cap.* 23 *s.* 22.

Bill for fees.
3 Atk. 740.
Amb. 109.
S. C.

Upon an attorney's or solicitor's appearing to be guilty of a gross neglect, the Court will order him to pay the costs.

Negligence.
1 P. W. 593.

Where a solicitor has been negligent in managing a client's business, this Court can grant an attachment against him.

3 Atk. 568.

The Court ordered an affidavit of the plaintiff's own solicitor's, which was made in the course of an inquiry before the Master, about his bill of costs, to be referred to the Master for impertinence.

Impertinence in affidavit.
3 Atk. 391.

An attorney or solicitor ought not to take a bond from a client for services, but if a client will give him one of his own accord, it is not absolutely void.

Bond from client.
2 Atk. 26. 29. 295. 298.

If an attorney or solicitor, pending the cause, gets from his client an extraordinary security for the payment of money, it will be set aside without any particular evidence of imposition; he is not allowed to take a present without a bill brought in, though a client may be generous, and give more than the bill.

2 Ves. 260.

An attorney or solicitor cannot take a bond from a client for unliquidated costs, notwithstanding such bond, and a mortgage has been given, the costs may be taxed, and upon payment, the attorney to re-convey, and the bond to be delivered up.

All

4 Bro. 351. 2 Ves jun. 199. S. C.

All courts will protect their suitors, and attornies cannot act with respect to the parties for whom they are concerned, as others may do.

Lien. 2 P. W. 460.

A country client employs an attorney or solicitor in the country in a cause in Chancery, the solicitor employs a clerk in Chancery, the client in the country pays his solicitor, who does not pay the clerk in Chancery; the client not bound to pay the clerk in Chancery; but if the latter has any papers in his hands, he may retain them.

Lien. 2 Atk. 114. Barnard. 264.

A clerk in court who lends money to a solicitor, is not entitled to detain client's papers as a pledge.

3 Atk. 720. 2 Ves. 407. Amb. 102.

A solicitor, who is in disburse for his client, has a right to be paid out of a duty decreed to an administrator, and a lien upon it, before the creditors of the deceased; nor can the administrator controvert this rule by insisting on applying the assets in a course of administration; for solicitors have a lien on the fund, and also on the estate recovered in the hands of the person recovering it, but not in the hands of the heir.

2 Ves. jun. 285.

Upon an act of bankruptcy, by lying two months in prison, joint and separate commissions issued: the former being established, the latter superseded, the attorney employed by the bankrupt, and in sustaining the latter against the former commission, has no lien upon papers delivered by the bankrupt after the arrest: upon petition by the joint creditors, he was ordered to deliver them up.

Bill taxed. 2 Atk. 29.

The Court will order a solicitor's bill to be taxed, though he has a mortgage to secure the payment of it.

2 Atk. 295 298.

A solicitor having taken a judgment of his client for 400*l.* whilst the cause was depending, and also several extraordinary charges appearing in his bill; Lord *Hardwicke*, though the bill had been adjusted and allowed 17 years ago, referred the bill to be taxed, and ordered the judgment and other securities to be delivered up.

2 Ves. 451.

Solicitor's bill is now ordered to be taxed, upon the client's submitting to pay what shall be found due, without bringing the money into court, as had used to be the case.

Secrets of client. 2 Ves. 96.

An attorney, on sale of an estate, not disclosing to the buyer an incumbrance, is liable to make satisfaction; as it is not disclosing the secrets and circumstances of his client.

An attorney admitted as a witness, must disclose acts done in his presence by his client, as execution of a deed, &c.; not private confidential conversation with him, as reasons for making it. 2 Ves. jun. 189.

Where a solicitor has been guilty of malpractices, he may be degraded by applying to strike him out of the roll of solicitors. Misconduct. 2 Atk. 173.

If an attorney makes an engagement to pay money for his client, but without his client's authority, the attorney is himself liable. Where liable to engagements for client. 3 P. W. 277.

Notice of motion given by one not allowed to act as a solicitor, not good. *Notice.* 3 P. W. 104.

Though a country attorney acts by an agent in causes in this court, yet he is to be considered as the solicitor likewise, though he resides in the country, and what is known to him, is notice to his client. Notice to solicitor. 3 Atk 37.

An attorney, who was concerned in a fraudulent bankruptcy was committed. *Fraud.* 1 Ves. jun. 394.

A solicitor was ordered to pay the costs, where he colluded with any of the parties against the others, and has been directed to shew cause why he should not be struck off the roll. *Collusion.* 1 Ves. jun. 196. 2 Ves. jun. 304.

An attorney, though a bankrupt, may practise. Bankrupt. 2 Ves. jun. 684.

SUBPŒNA

[IS a mandatory writ or process directed to one or more, requiring him or them to do somewhat, and it is generally *sub pœna centum librarum* (or other sum); or *sub periculo incumbente*; from which words of *sub pœna* it has its name. Yet other, like mandatory writs, have the same name, though these words are not used; nor are they ordinarily any thing but *in terrorem*.] What.

[None that shall counterfeit a *subpœna*, shall be permitted to write under or for any clerk of the six clerk's office.] Counterfeiting subpœna.

[No clerk or other shall appear on any counterfeit *subpœna*.] [Or. Ch. 86.]

Subpœna ad Respondendum.

What.

[IS the first and leading process of this Court, in suits by *English Bill*, by which the party defendant against whom the complaint is, is summoned and required to appear at a time to come, and answer the complaint, under a certain pain.]

Toth. 2.

Where there are more names than one.

[To each *subpœna ad respondendum*, containing more names than one, there is for each name more, a label or small piece of parchment, containing the plaintiff's name, and the name of one of the defendants, and the day of appearance, *&c.*]

Only three names in one subpœna.

[There shall not be above three defendants' names in one *subpœna*. But as husband and wife are accounted but one person, so their names are accounted but as one.]

Px. Alm. 2.

Security to satisf. costs.

[By the 15 *H.* 6. *ca.* 4. *subpœna* is not to be granted till surety be found to satisfy the defendant his damages and expences, if the matter contained in the bill cannot be made good. But it is now otherwise practised; though sometimes security in the sum of 40*l.* is ordered, if the plaintiff lives, or is going beyond sea.]

Hind. 76.

4 Inst. 84.

[By the opinion of two Judges, the surety mentioned in the statute ought to be an obligation from the plaintiff.]

Bill filed before subpœna issues.

[Heretofore, the *subpœna* was not sued forth till the bill was filed; though lately it might be. But now by act of parliament, the bill must be first filed, except in certain cases.—*Vide Bill.*]

Return.

[If this *subpœna* be made returnable in term, it may either be on a certain day of the month, or upon the common return days; as *a die Paschæ prox' futur' in unum mensem*, where the feast day is not come: *a die Paschæ in unum mensem prox' futur'*, where the feast is already past; or on a certain day after any of the usual returns.]

2 Toth. 2.
C. A. 430.

[In vacation, upon affidavit that the defendant lives in *London*, or within ten miles of it, a *subpœna* may, upon petition or motion, be had returnable *immediatè*.]

Affidavit.

[Said, the affidavit must name the place where he lives.]

[This

[This process is not issued against a baron or peer of the realm, till after a letter directed to him by the Lord Chancellor, acquainting him that there is such a bill filed against him; and desiring him to order an appearance to be entered at a day therein prefixed (the day of the return of the *subpœna*, if there be other defendants); which if he neglects to do, then on motion, *&c.* a subpœna issues against him.] Against whom issued. [Pr. H. Ch. 2. Px. Alm. 3.]

[If he appears not, *&c.* upon the *subpœna*, an attachment issues.] Appearance. [Toth. 15.]

[So, if upon the letter he appears, but answers not in due time, an attachment issues, which upon the letter only it could not do; in regard no Great Seal was seen, and so no contempt.] Attachment. [Pr. H. Ch. 2.]

[These letters are but of courtesy, and said to have begun 16 *Eliz.* since when there have been also letters *ad audiendum judicium*; but it is no matter of exception, if a *subpœna ad audiendum judicium* be served, and no letter sent.] Letter missive. Ibid. 3.

[As to the serving this process *ad respondendum*; if there be but one defendant, you must deliver the writ to the party himself, or leave it with one of the family at his dwelling-house or place of residence.] Service. [Or. Ch. 94.]

[If there be more than one defendant, deliver to each a label or note of the contents, (*viz.*) the court, the day of appearance, and at whose suit, at the same time shewing the writ under seal; and deliver the writ to the last, or leave it at his house or usual place of residence.] Ibid.

[So shewing the *subpœna* at his dwelling-house, to his wife or servant, and leaving a label of the *subpœna* or note of the day of appearance, *&c.* is said to be good service.] [1 Px. Alm. 53.]

[It is *held* good service to leave the *subpœna* hanging on the door, or put in under the door, or by the window of the house where the defendant ordinarily dwells or resides. But this is where it is presumed the *subpœna* comes to his hands afterwards, or he has notice of it, or that he might probably be in the house at the time, and neither he nor any of the family would be seen, *&c.*] But if it be sometime, as a year, since he left the house or lodging, the service is bad. 2 Vern. 369. Prec. Ch. 99.

[Said, hearing the defendant own that he was served with the *subpœna*, is good evidence to prove service. So is affidavit, that he saw such an one served with the *subpœna*.] Service, proof of. [2 To. 6.] Cary 104. 115. 131.

Service.

[The Court, on affidavit that the defendant was absented from his lodgings and could not be found, ordered the leaving of the *subpœna* at his last abode to be good.]

[And, *this is an usual order.*]

Service party abroad.

[Where the defendant has a bill pending in this court, or a suit at law against the complainant, and the now defendant is not to be found or heard of, or is beyond sea; the Court will, on motion, order service on another of the parties, the clerk in court, or the attorney at law, to be good service.]

1 Ch. Ca. 67. 1 P. W. 523.

Service upon prisoner.

[The Court, on motion, ordered the leaving of a *subpœna* with the turnkey of a prison, to be good service on a prisoner at large there.]

[If the defendant be a prisoner there (actually I suppose) so to leave it, is said to be good service without a previous motion.]

Service baron and feme.

[Where the husband only served, hath notice that the *subpœna* is against his wife too, it is good service for both; and for want of an appearance for the wife, an attachment may issue against both.—But said, you cannot serve the wife without the husband.]

[Cary Rep 92. Tot. 11. 13.]

Service.

[This process must be served before noon (at furthest) of the day of appearance.]

[Pr. Alm. 2.]

[Service in the night is good.]

[The plaintiff shewed the defendant a writ, but did not deliver him a note of the day of his appearance here; nor did the same appear by the label, or any other writing; and the defendant appearing, found no bill: the Court ordered the defendant good costs against the plaintiff for such serving.]

[Cary Rep. 83.]

Forging subpœnas.

[15 *January*, 15 *Car.* 2. two persons concerned in forging *subpœnas* were, on affidavit and examination before the Master of the Rolls, committed to the Fleet.]

[Or. Ch. 86.]

Contempt.

[For a contempt of not appearing upon a *subpœna ad respondendum*; or, having appeared, for not answering; there goes of course, an attachment.]

Stat. 4 Ann. c. 16.

By the statute 4 *Ann. c.* 16. no *subpœna* or other process for appearance shall issue till after the bill is filed with the proper officer, and a certificate thereof brought to the *subpœna* office, except in cases of bills for injunctions to stay waste, or stay suits at law commenced; and although solicitors, through ignorance or inattention, frequently sue out and serve this

this writ before the bill filed, taking care to file the bill on the return-day; yet that practice is irregular (except in the cases mentioned in the statute) and the complainant does it at the risk of costs; to prevent which the six clerks used to antedate the bill: but by an order made by Lord *Clarendon* "all bills are to be dated the same day they are brought into the six clerks' office, and no six clerk to presume to antedate any bill."

Hind. 77.

Bills not to be antedated.

Ord. Ch. 93.

And if defendant be served, and before the return of the writ, he instructs a clerk to search if any bill be filed, and it appears that no bill has been filed, he may prefer costs, unless it be an injunction cause.

Costs, bill not being filed.

Hind. 77.

A *subpœna* out of this court may be made returnable in the Mayor's court, or in the Chancery in *Ireland* in certain cases; but then no attachment issues here for contempt.

Where returnable.

1 Vern. 406. 420.

A *subpœna* returnable *immediatè*, may be made out against an officer of the Court without the usual affidavit, because he is presumed always to attend.

Returnable immediatè.

Mos. 42.

A *subpœna* may be made returnable and served on the same day it is sealed.

Hind. 80.

Service.

If the *subpœna* be against husband and wife, service on the husband is good service on him and his wife, and service on the wife is good service on the husband, if the body be left with her under seal at the husband's place of abode, because it is presumed to be sufficient notice to the other; but leaving a label with the wife has been doubted if good service on the husband.

Service.

Hind. 84.

No process can be served on a prisoner committed at the suit of the crown without leave: but Lord *King* having been one of the commissioners before whom the prisoner was tried, made an order that the keeper of Newgate should admit a person into the prison to serve him.

Service upon a prisoner.

Mos. 237.

If upon a copy served, and the writ shewn, the person speaks contemptuous words before he knows the contents, or from what court it issued, it will be a contempt.

Contempt of the subpœna.

6 Mod. Ca. 43.

If the contempt be by abusive actions, as beating or abusing the person who serves the process, the offender shall be on motion committed upon an affidavit thereof, without examination.

How punished.

Ord. Ch. 116.

So of contemptuous words he shall be committed upon the affidavits of two persons, without further

How punished.

3 Ch. Rep. 41.

examination: and a single affidavit in such case is sufficient to ground an attachment, upon which he shall be examined, and if the misdemeanor be confessed or proved, be committed. And if he shall not be thereof found guilty, save by the oath of the party, who made such affidavit, he shall be discharged, but without costs in respect of the oath made against him.

Proof of contempt.

Ord. Ch. 116.

Contemptuous words were spoken of the *subpœna*, and the person serving severely beaten, yet, these facts being proved by one witness only, the Court would not commit the contemner, but made a rule upon him to shew cause why he should not stand committed.

Proof of contempt.

3 Atk. 219.

A counterfeit *subpœna* does not oblige; and whosoever serves it, if he knows it, misbehaves himself; and an attachment will go against him.

Counterfeit subpœna. Hind. 86.

If the defendant be a member of the House of Commons, an office copy of the bill, signed by the proper six clerk or his deputy, must accompany the writ, and may be served personally; or, which is more convenient and most usual, by leaving the *subpœna* under seal, and a copy of the bill, at the defendant's dwelling-house, or place of residence, with one of the family.

Member of parliament. Hind. 87.

Members of either house of parliament are not obliged to pay for or take out any other copy upon their appearing thereto.

Ord. 28 Nov. 1743.

If a bill be filed against a corporation, the process must be served upon some one of its members.

Corporation. Hind. 87.

In cases where persons have withdrawn themselves beyond the seas, or otherwise absconded, to avoid the process of the Court, the Court may fix a day for their appearance, to be inserted in the Gazette, and published in the parish church of the defendant, and posted in some public place, and the defendant not appearing, the bill may be taken *pro confesso*. *Vide Appearance*.

Defendant absconding. *Stat.* 5 *Geo.* 2. *c.* 25.

Lord *Hardwicke* was of opinion, that it was not sufficient to make an affidavit that the party making it *was informed* and *believed* that the defendants withdrew themselves into *Ireland*, to avoid being served with the process of this Court, but it must be set forth by whom the party deposing received such information.

Barnard. Chan. 461.

If the minister of the parish prevents an order pursuant to the statute being published, as the act is silent, not mentioning any penalty for disobeying it;

2 Atk. 114.

Lord

Lord *Hardwicke* was of opinion that such minister is indictable.

The statute omits the case of a defendant who has been served with a *subpœna* and neglects to enter his appearance, and avoids the process of contempt. Plaintiff in such predicament is left to the ordinary method of issuing process to a sequestration, and holding the lands sequestered; for defendant must have appeared or been in custody before a decree *pro confesso* against him can be made: all that the Court can do, is to grant an injunction grounded upon such sequestration.

Where defendant does not appear. Hind. 90.

Quære, whether a subpœna can regularly be served out of the jurisdiction? *Vide Burke* v. Lord *Macdonald*, *Michaelmas* 1780. *Quære* also, whether a foreigner can be served in a foreign country. *Pree. Ch.* 83.

Served abroad. Hind. 90.

Defendant residing abroad, authorised *Turton* and *Summerton*, two attornies, to receive a *subpœna* for him, and to enter an appearance; plaintiff filed his bill, and applied to *Turton* and *Summerton* to accept the *subpœna* and appear, which they refused to do, and the Court would not compel them. *Willings* v. *Loman*, *Hil.* 1781.

Where defendant is abroad. Hind. 91.

Defendant lived at *Epsom*, and being a barrister had chambers in the *Temple*, but had little or no business. A *subpœna* returnable *immediately* was moved for, upon an affidavit, stating that the defendant's place of abode was at *Epsom*, but that he resided in the *Temple*. Motion refused, as it did not appear that his place of abode was in the *Temple*.

Subpœna returnable immediatè. Hil. 1781. Hind. 92.

Defendant, who was a member of parliament, had a house at *Southampton*, but no town residence, was served with a *subpœna* returnable *immediately* in *London*, at a friend's house where he was upon a visit. Defendant moved to set a sequestration aside, which had been awarded for default of appearance, on the ground of irregularity, he having no place of residence in town: motion refused, as the Court could not believe that a member of parliament, whose duty it was to attend during the session, had no residence in town, and the residence above stated was considered sufficient.

Hind. 92. East India Company v. Sir Thomas Rumbold. Hil. 1781.

Defendant having a town residence and a country residence, a *subpœna* returnable *immediatè* was served, by leaving the body under seal at her house in town, she

In a town cause. Appearance. Hind. 92.

she being then at her country residence, above ten miles from town; she appeared *gratis* as in a town cause, and obtained *a commission to take her answer, and six weeks time* to return it. Upon motion by plaintiff to set aside the order, Lord *Thurlow* said, that her appearance *gratis* as in a town cause did not make it so, and refused the motion.

Earl of Leicester v. Perry. Hil. 1782.

Counterfeiting the Great Seal.

A clerk in Chancery was committed for sending writs into the country with soft yellow wax upon them, without being sealed with the Great Seal. A high misdemeanor next to counterfeiting the seal; and he was bound in 1000*l.*, with two more in 500*l.* each, for his appearance.

12 Mod. 355.

Service. Infants. 2 Atk. 70.

Where infants are parties, and the mother secretes them, so as they cannot be served, a service upon the mother is sufficient, as she is the natural guardian.

Amended bill. 3 Ves. jun. 251.

On an amended bill it is not necessary to serve new *subpœnas* on the original defendants.

A Subpœna for Costs.

This process issues,

[FOR not putting in a bill;]

[For putting in an insufficient answer;]

[And, upon an irregular proceeding; or such like.]

Service.

[It must be personally served; because the costs are to be demanded by and paid to the party, or him that serves it.]

[But where affidavit is made, that the party to whom the *subpœna* is directed, is not to be found; the Court, on petition or motion, will order, that leaving it with his clerk in court, or as the Court shall see fit, (as at his last place of abode,) shall be good service.]

[Or. Ch. 94.]

[If the party for whom the *subpœna* is, serves it not himself. The bearer, (*viz.* he that serves it) must have a letter of attorney or other sufficient authority, to demand and receive the money.]

[Upon

[Upon affidavit of due service, demand and refusal to pay, an attachment issues, and so further process of contempt, as in other cases.] Attachment.

[Oath, that the party confessed he was served with this process, and had not paid the costs, was held sufficient.] Cary Rep. 261.

A Subpœna to make a better Answer.

[IT may be, and commonly is, returnable *immediatè*.] Return.

[It may be served as a *subpœna ad respondendum*; or it may be served by leaving it with the clerk in court. O. 29th *October* 1683.] Service. [Cl. Tut. 36.]

[Said, if there be eight days in term from the time of service; the defendant must take a *dedimus*, or answer in eight days after service.] [Ibid. Cl. Tut.]

[The plaintiff may at his election have one *subpœna* for costs, and another for a better answer, upon the former insufficient one; or one *subpœna* for both the costs and a better answer.] [Px. Alm. 10. Toth. 11.]

[Upon a *subpœna* to make a better answer, the defendant is to appear and answer, as on the first *subpœna*.] [Px. Alm. 11.]

[If he appears not thereon, but stands out all contempts, such process and proceedings are used, as upon the first *subpœna* to appear; but all such process are to be made returnable *immediatè*, and served on the clerk in court, till the party prosecuting arrive at such process of contempt, as he was at before. O, 29 *October* 1683.] Process returnable immediatè. [Cl. Tut. 36.]

Subpœna duces tecum.

[IS so called from the words of the writ, which commands the party to appear in court such a day, *duces tecum*, a deed, or writings, &c. confessed by his What.

answer to be in his custody; or to shew good cause to the contrary.]

West. sect. 54, 55. [Sometimes it is general, for all writings touching such a matter.]

[Sometimes such writ is granted where the defendant confesses money in his hands, and offers to pay it into court, or the Court orders it to be paid in.]

How obtained. [This writ must be had upon motion and order.]

Or. Ch. 70. [It is to be made by the clerk of the *subpœna* office only.]

Service. [It is to be served as a *subpœna* to an answer.]

[*Note*, all this is now commonly done by order, on motion; and this writ is little used.]

Vide Writings, Order,

Subpœna to rejoin.

What. [IT requires the defendant to answer the plaintiff's replication; which if there be occasion to do, (which is but seldom) it must be done in eight days.]

Service. [It must be served as a *subpœna* to answer.]

[Or. Ch. 94.] [If it issues before the replication is filed, and the replication be not filed before the return thereof, it shall be of no force; and the party on whom it is served shall have the ordinary costs taxed.]

[Or. Ch. 45. 94.] [If the defendant has demurred and disclaimed, and made no other answer; and the plaintiff replies and serves him with a *subpœna* to rejoin; he shall have costs for the unjust vexation: for the plaintiff could not regularly reply, nor call the defendant to rejoin.]

Toth. 15. [If this process be not served before hearing, the plaintiff will not have the benefit of the proofs in the cause, which is not now at issue; but stands upon bill and answer only.]

[Upon the return of this process, the complainant may give the defendant a rule to rejoin by that day sevennight; by which time, if he does not rejoin, he shall lose the benefit thereof.] *Vide Rejoinder.*

Toth. 20.

Subpœna ad Testificandum,

[IS mostly used to call witnesses before an examiner in town.] *Vide Hind.* 326. What.

[It is, (I think) to be personally served.] Service.

[It is sometimes used to bring them before commissioners on a *dedimus* in the country. For though such commissioners say the commissioners shall call witnesses before them, and they often do so; yet if the witnesses appear not on summons, (which is by note or ticket under the hand of two or more commissioners,) no attachment lies against them: they are in no contempt; no writ being directed to them, nor the Great Seal shewn them.] When used.

[If reasonable charges be not given or tendered the witness, he seems not bound to appear; for in such case an attachment for non-appearance was superseded.] Charges of witnesses. [Pr.H.Ch.161.]

[It is certain, if the witness insists on having his charges in hand, and reasonable charges are not given or tendered him, he is not bound to appear.]

[Said, if a commission is lost to either party by the non-appearance of witnesses summoned, a new commission (if desired) will be granted on oath of the matter.] Commission lost. [1 Px.Alm.19.]

[Where a witness refused to be examined before commissioners, the Court, upon motion, granted a *subpœna* for him to be examined in court, at his own costs: and this is said to be the usual way of dealing with such witnesses.] Witness refusing to be examined. [Cl. Tut. 9.]

[If a peer be a witness, my Lord Chancellor's letter goes to him, before a *subpœna* issues.] [Cl. Tut. 15.] Letter missive.

[Heretofore, it was usual to grant a *subpœna* to witnesses living out of *London*, and the jurisdiction of the Lord Mayor's court, to testify; but some abuses of this process happening, it is by an ancient order appointed, that this process shall not issue for a witness's appearing before the Mayor of *London*, without the Lord Chancellor's hand thereto first had. When used. Pr. H. Ch. 114.

It is likewise used to compel the appearance of a witness to prove a deed, *&c. vivâ voce* at the hearing, and then the return should be the day on which the cause is set down to be heard: this process ought not When used. Hind. 372.

to

to be applied for, till the *subpœna* to hear judgment is served, and an order to examine *vivâ voce* at the hearing should be previously obtained.

Subpœna ad audiendum judicium.

[WHEN the cause is ready for hearing, this process is to be sued out on note in writing, under the hand of the Registers or their respective deputies, of the day the cause is set down for hearing.]

Return. [Said, it must be made returnable, (*i. e.*) *ad essendum in Can' ad audiendum judicium*, &c. some days before the day of hearing, except in the beginning of the term, when the time will not bear it. And on the back of the writ must be set down the very day appointed for hearing.]

[Com. Sol. 33, 34.]

Service. [It is to be served personally, or left with one of the house or family of the party. If above twenty miles from *London*, it must be served fourteen days exclusive before the time to hear judgment, except in the short vacation betwixt *Easter* and *Trinity* term; and then ten days.]

[Or. Ch. 94.]

[If within twenty miles, it must be served ten days before the time to hear judgment; save in the short vacation, when it needs be served only eight days before.]

Service, proof of. [Producing the *subpœna* at hearing has been held a proof, *primâ facie*, of service, though there was no affidavit of it.]

[When other or further proof is required, the oath of one witness is sufficient.]

[Cl. Tut. 6.]

Service on solicitor. Motion, that service of *subpœna* to hear judgment on a person who acted as solicitor for defendant might be good service; the clerk in court not being to be found, nor any one attending at his office, nor the defendant, granted; a copy of the order being also left at the last place of defendant's abode.

2 Ves. 23.

Infant. Where an infant is defendant, the service of this writ must be on his guardian, not on the infant.

2 P. W. 643.

Subpœna to revive

(Vide *Bill of Revivor*)

ISSUES upon a bill of revivor, and is to be served as a *subpœna ad respondendum.*] When it issues.

[Upon the defendant's appearance the suit will be revived on motion; if they, by answer or otherwise, do not shew cause to the contrary.] Cause revived.

[So if the defendant do not appear, (which, where the bill of revivor requires no answer, he may forbear without contempt,) then eight days after the time of appearing and answering is out, the cause stands revived.] When. [3 Px. Alm. 18.]

Although defendant appeared and answered the original bill, if he cannot be found to be served with a *subpœna* to answer a bill of revivor, the plaintiff must proceed under 5 *Geo.* 2. to have the bill taken *pro confesso.* Decree pro confesso. 3 Atk. 690. 2 Bro. 127.

Subpœna ad faciendum Attornatum. [West. sect. 56.]

[SAID, where a cause, before decree is perfected, has depended more than a year without proceedings, this process ought to issue to the defendant before the plaintiff proceed; because the warrant of attorney is determined: it must be served as a *subpœna ad respondendum.*] When used.

If the party's clerk in court be dead, no process can be taken out against the party, until he has appointed a new clerk in court, and a *subpœna ad faciend. attorn.* must be taken out for that purpose, because till then the party is not in court. 1 P. W. 420.

Service of this process is good if left at the house. Service. Ibid.

Subpœna scire facias to revive.

[WHERE a decree is enrolled; and a party dies, or a female plaintiff marries, or that there have been In what cases. [1 Px. Alm. 59.

3 Px. Alm. 17. 66, 7. Ch. Ca. 37.] been no proceedings on the decree for a year; the decree and proceedings must be revived by this process. Though in case of a decree enrolled, a reviyor by bill hath been allowed good.]

[And it hath been said, where you can revive by this process, it is in your election to do it either by this process or by bill. But where, after the decree there have been proceedings, as aforesaid, which cannot be revived by *subpœna*; it is sure you may do it by bill.] [2 Ch. Rep. 67.]

By whom. [This process can be sued only by the parties, or by their privies in blood, as heirs; or in contract and representation, as executors and administrators.] [1 Px. Alm 46.]

How obtained. [It is obtained by petition, or motion of course.]

Service. [The manner of serving it is, as of a *subpœna ad respondendum*.] [Or. Ch. 94.]

[Said, it must be served two days at least before the return.]

Decree revived. [If no cause be shewn to the contrary at the return, the decree will, upon affidavit of service and motion, be ordered to stand revived, *nisi*, &c.]

Costs. [It is revived without costs to the other party.]

By whom. [No assignee or other person, than as aforesaid, can have this process; but must bring an original bill.] [1 Px. Alm. 46.]

1 Vern. 426. [Said, if an entire sum be devised among younger children to be raised out of lands, and after decree, one of them causes an abatement; there must be a revivor before any of them can have the fruit of the decree.]

In what cases. Abatement. [1 Px. Alm. 46.]

[But if there be a decree for several plaintiffs, and their demands are severally decreed, or are so distinct, as that it clearly appears to the Court how much in particular is due to each, and of them one dies, &c.]

Ibid. [Said, the rest may proceed without revivor.]

Demurrer to the writ. [This writ is not to be demurred to, it being no where filed, or of record; but the cause of exception must be shewed upon the order, at the return of the writ.] *Sed vide* 1 *Vern.* 426. *contra*. [1 C. C. 50.]

[Said, though the writ mention not the party to be heir or executor, yet if the order does it is sufficient.] 1 Px. Alm. 46.

[Said, heretofore *subpœna* injunctions for performance of a decree have been used, but are now quite out of use.]

Injunction. Plaintiff cannot sue out execution upon a judgment after a lapse of a year and a day without a *scire facias*, 3 P. W. 36.

and

and his having been prevented by an injunction does not alter the case.

A *scire facias* to revive a judgment, is no breach of an injunction to stay execution. 3 P. W. 148.

Upon a *scire facias* on a judgment, the defendant shall not insist upon any thing but what might have been insisted on at the hearing of the original cause. 2 Atk. 468.

SUITS.

VIDE

Parties.

[ALL suits in this court are by *English Bill*, and the proceedings of the Court are by *Writs*, *Orders*, and *Decrees*.] [West. sect. 32.]

SUPERSEDEAS

(Vide *Privilege*)

[IS either a writ commanding him or them to whom it is directed to forbear doing any thing further in the execution of some writ or process of this Court (therein recited) to them formerly directed; and if the party, *&c.* be taken, to set him at liberty, *&c.*] What. 1 Px. Alm. 73. 105. 116, 117. 74.

[Or it is to interdict, or supersede process or proceedings elsewhere; for which *vide Privilege.*]

If a defendant appears before he is taken upon an attachment, proclamation, or commission of rebellion, then a *supersedeas* may be had to such writs, without paying costs to the complainant; but it is usually granted on motion and *affidavit*, shewing cause for it. Cur. Can. 86.

A clerk in Chancery was sued to the *exigent* in the *Common Pleas*, then issues a *supersedeas* to the Sheriff; *quid improvide emanavit*, and then he brings a writ of privilege to the Justices of the *Common Pleas*, requiring them to surcease; the privilege was disallowed, the Court being possessed of the plea, inasmuch as the

the *superfedeas* affirmed the jurisdiction; for the *superfedeas* improvidè, &c. recites the defendant's appearing; but if he had not sued out the *superfedeas*, the privilege would have been allowed.

Dyer, 33.

Writ *excommunicato capiendo* returnable in the King's Bench, *but not returned*, was superseded. *Sed vide* 3 *Atk.* 479. 2 *Atk.* 498.

1 P. W. 435. Amb. 59.

Capias in an action on the case, taken out on the 31st of *January*, the original on which it was founded made out on the 31st of *January*, but *teste'd* on the 16th of *October* preceding, being the common *teste* day before *Michaelmas* term; defendant pleaded *non assumpsit* and *non assumpsit infra sex annos*, and then moved that the teste of the writ might be altered, or that the writ might be superseded, which was refused.

Amb. 376.

SURREJOINDER.

[IS a second defence of the complainant's suit and bill, in answer and opposition to the defendant's rejoinder.]

[It is used only where, by reason of some new matter disclosed in the rejoinder, the parties cannot come to issue without an answer thereto.]

[Said, surrejoinder, rejoinder, and special replication, are now out of use.]

[Px. Alm. 16.]

Et sic de cæteris.

TRUSTEES.

Costs.

[SAID by the Court, trustees, executors, guardians, &c. shall not pay, but have costs, except they be guilty of some breach of trust, or some wilful misdemeanour.]

Toth. 156.

Witnesses.

[Said, trustees shall not be examined as witnesses one against another.]

[A trustee examined as a witness was afterwards thought necessary by the Court to be, and was made, a defend-

a defendant. Upon hearing, his depositions were not allowed to be read, though he should pay no costs, nor should gain, or lose by the decree, (be it as it would,) because the decree must be against him, and his depositions are to affirm his own act.]

Infants, being trustees only, by *statute 7 Ann. c. 19.* may be obliged to convey as the Court shall direct, without a day. Infants. 1 Harr. 775.

Regularly no act of the trustee shall prejudice the *cestui que trust*; but the trustee shall make good the trust. And the law is the same of the act of God; for if the trustee of a legacy dies before the legacy is paid, this shall not prejudice the legatee. Ibid.

A trustee may in some cases sue in his own name, but ordinarily *cestui que trust* must be made a party. Ibid.

Regularly he is not to have any thing for his own labour and pains; yet if he employs a skilful bailiff, and gives him 20*l per annum*, that must be allowed for he is not bound to be bailiff, and he shall not pay but have his costs, except he be guilty of some breach of trust, or some wilful misdemeanour. 3 P. W. 251. Toth. 156. 2 Ch. Ca. 138. 1 Vern. 144.

If a trustee be robbed of the money he received, he shall be allowed it on account, the robbery being proved, although the sum is only proved by his own oath, for he was to keep it but as his own. 2 Ch. Ca. 2. 132.

Where there are more than one, there is a difference between trustees and executors, for trustees have all equal power, interest, and authority, and cannot act separately, as executors may, but must join both in conveyance and receipts; where trustees join in the receipt of money, both are not liable, otherwise with respect to executors. Cro. Car. 312. 1 Salk. 318. 2 Vern. 515. 570.

In the case of trustees, though there are not negative words in a deed, *that they shall not be liable* for the acts of one another, yet this Court will not make one trustee liable for more than he has received; but if trustees will bind themselves to be liable for the acts of each other, this Court will not relieve them. 2 Atk. 385.

A trustee cannot purchase the trust estate. 1 Ves. 9.

The principles upon which equity proceeds in regard to trusts, seems more connected with this title, than the mere *practice of the court. In compliance, however, with the author's plan, a few cases have been inserted: to have stated more would have been too great a departure from the professed object of the original work.*

USHER OF THE COURT.

Office.

[THE Usher is said to be the same officer anciently known by the name of the *Portage of the Chancery*.

His oath is;

Oath.

"You shall swear, that well and truly you shall "serve the King in the office of *Portage of the Chan-* "*cery*; and that you shall be continually attendant "upon the said office, and no time you shall absent "yourself without special leave of the Chancellor, or "of the Keeper of the Rolls, and that for good and "just cause; and that you shall not carry or bear, "nor suffer the rolls to be carried or born, to any "place, but unto the place to the same ordained and "deputed; and that you shall not shew them to any "person but by the commandment of the said Keeper "of the Rolls, privily or openly; and that you shall "not assent that any fraud or deceit be done to the "said rolls, as by taking of copy, or by the sight of "the said rolls, privily or in any other manner. And "of fraud and untruth that you may know to be done "in the said rolls, or any thing that appertaineth to "your keeping of the same, you shall tell to the "Keeper of the said rolls without any conceal-"ment."]

Office.

[His office is daily to attend the court, to provide things necessary and decent there, to keep the money (*a*) and writings brought into court, not directed to be kept by a Master.]

20 Car. 2. Discharged for non-attendance.

[20 *Car* 2. the Usher of the Court was complained of; the Court ordered him to be called three several times on three several days successively, to attend in court according to the duty of his place. He was called and did not appear. The Lord Keeper ordered the defaults to be recorded in the Petty-Bag. At another day he was again called three several times; and not appearing, his Lordship declared his place to be forfeited and void; and ordered these defaults, and his Lordship's order thereon, to be recorded in the Petty-Bag.]

[Or. Ch. 129.]

(*a*) Now kept by the Accountant-General. Stat. 12 *Geo.* 1. *c.* 32.

WARDEN OF THE FLEET.

[HE is the Keeper of the Fleet prison; which is the prison both of this court, and of the court of Common Pleas, where most of the original writs issuing out of this court are returnable.] Office.

WARRANT UPON ORDER FOR A SERJEANT AT ARMS.

[IF a person be in custody in the country upon an attachment, or other process of contempt, a Serjeant at Arms (or rather messenger as he is then called) is sometimes ordered to bring him up. And so a messenger is ordinarily directed upon an order of commitment.] When Serjeant at Arms is to bring up a contemner.

[But what is commonly called an order for a Serjeant at Arms, is where the party having stood out a commission of rebellion, and not taken, the Court orders a Serjeant at Arms to take him.] Order for Serjeant at Arms.

[If in some reasonable time he cannot take the party, or that the party escape or abscond, the Court will grant a sequestration.] Sequestration.

[The Register is on request to draw up the order for a Serjeant at Arms; but not to deliver it to any but the Serjeant or his deputy, they paying for it.] Order for Serjeant at Arms. [Or. Ch. 200.]

[Such order being drawn up and passed by the Register, the contempts thereon are not to be discharged, nor are the parties to make any agreement for the matter in question, or for discharging the contempts, till the Serjeant's fee be paid, and the same certified under his hand.] Ibidem.

[After the order is passed, there must be a warrant thereupon signed by my Lord Chancellor.] Warrant.

[A counsel moving for a Serjeant at Arms, must then in court deliver to the Register the commission of rebellion, and tell who is clerk in court, that the Serjeant may have an account from him where the contemner lives.] Motion for Serjeant at Arms.

[Upon the Serjeant's return of *non est inventus*, the Court being moved ordinarily grants a sequestration.] Sequestration.

WITNESS.

VIDE

Evidence.
Examination.
Demurrer.
Commission to examine.
Subpœna to testify.
Bill to perpetuate, &c.
Parties.

Outlaw. [Cl. Tut. 6.]

[A MAN outlawed is not to be received as a witness in any matter.]

Who may be.

[All persons that are good witnesses at law, are so here.]

How compelled to attend.

[They may be subpœna'd to testify, and then an attachment lies against them if they do not appear, *&c.*]

[Upon commission to examine, they may be summoned, *&c.* by the commissioners to testify; and though no process of contempt lies thereupon, if they do not appear, *&c.* yet if they do not, the Court will commonly order them to come up to town at their own charge, and be examined here by an examiner of the court.]

[If witnesses appear not upon *subpœna*, process of contempt may be had against them; but they seem not within the statute 5 *Eliz. cap.* 9. to enforce the appearance of witnesses; because the proceedings by *English* bill in this court are not strictly of record.]

Peers.

[Said, peers, as well as others, are to give their testimony upon oath.]

The clerk who shews the witness must give a note of his abode, &c.

[When a witness is brought before a clerk in court to be shewed, (which regularly he must be before his examination before an examiner,) the party that produceth him shall not only give a note in writing of the name and title of such witness, and the parish where he lives, but if the parish be within the bills of mortality, such notice shall likewise contain what street and house he lives in, and whether he be an housekeeper or lodger, to the end he may be more easily inquired for, and cross-examined, if required.]

[Or. Ch. 164.] Defendants examined.

[Where there are several defendants named in the bill, some of which are not served with process, those

not served may upon order be examined by either party; and if both sides examine them without order, it is well, for each hath thereby allowed them good witnesses.] [Cl. Tut. 7.]

Before answer.

[A defendant may, by motion of course, be struck out of a bill before answer, in order to be examined as a witness. So he may after answer, paying costs for the dismission as to him.]

After answer.

[But if he has answered, and the plaintiff is in doubt whether he will be a good witness or no, or whether he may upon hearing be found a necessary party, he may let him stand in the bill, and have an order to examine him *de bene esse*.] [2 Ch. Ca. 214.]

Baron and feme.

[Though ordinarily the wife is not to be examined as a witness for or against her husband, yet in some cases it has been allowed, as to discover her husband's deceit, &c.] [Toth. 94] 2 Vern. 79.

[Where the defendant had examined his own wife as a witness, it was ordered the plaintiff might take a *subpœna* against her on his behalf, and if the defendant would not suffer her to be examined, then her examination on his part to be suppressed.] [Ca. Rep. 135.]

Examination de bene esse.

[Upon certificate of the bill's being filed, and an appearance entered, and upon affidavit of the great age or sickness of witnesses, the Court will give leave to examine them *de bene esse*, before a Master.]

Guardian.

[A guardian hath been ordered to be examined as a witness.] [Toth. 109.]

Witness non compos.

[If a witness produced is not of competent understanding, the adverse party may except against him, and the commissioners ought not to examine him. But if they who have the carrying of the commission will examine him, the other commissioners must certify the matter to the Court, and make affidavit of the irregularity.]

Interested witness.

[A witness was excused from being examined touching articles concerning a lease of land whereof he had the reversion.] [Pr. H. Ch. 137.]

Cross-examination.

[If a witness refuse to be cross-examined, it is a cause of exception to his testimony, and the Court, on motion, will suppress his depositions *ex parte*; for it argues favour and partiality.] [Cl. Tut. 9.]

Defendant.

[Though a defendant is dropped by a plaintiff, who never replies to his answer; yet he cannot be examined as a witness by the defendant, without order of the Court] and then he may. 3 P. W. 288.

Re-examination. [A witness is not to be re-examined either in chief before, or on account, &c. after hearing, without leave and order of the Court: if he be so examined twice before, or twice after, without order, the Court will quash the latter depositions.]

2 Ch. Ca. 217. 1 Bro. 388.

Interrogatories. [On re-examinations the Master generally settles the interrogatories.]

Witness examined short. [Where it was alledged that a witness had not fully answered the interrogatories for want of certain court rolls, and that he had referred himself to former depositions, but does not say in what cause, or where, the Court ordered a Master to examine the matter; and said, if he should find that the witness had not fully answered, he should then be ordered to answer fully] or to attend personally.

[Ca. Rep. 116.] 2 Ver. 106.

Or mistaken. [Where it is apparent from books, accounts, &c. that a witness has mistook in his depositions, it is a good cause to be shewed the Court why he should be re-examined; and some seem to think such apparent cause not necessary; but that leave to re-examine is a thing almost of course.] But not where the witness alledges that he was mistaken.

3 Bro. 370.

1 Ch. Ca. 25.

Publication. [After publication, the Court would not suffer a deposition mistaken to be amended.]

[Toth. 77.]

Defendant disclaiming. [Where a defendant has answered and disclaimed all interest in the matters in question, either party on petition or motion, may examine such defendant *de bene esse*, which is a *salvo* to the other side for any just exception that can be made at hearing against reading such witness.]

[Px. Alm. 22.]

Trustee defendant. [A trustee examined as a witness, was afterwards thought necessary to be, and was made a defendant. Upon hearing, his depositions were not allowed to be read, though he should pay no costs, nor should gain or lose by the decree, (be it as it would,) because the decree must be against him, and his depositions are to affirm his own act.]

[Said, trustees shall not be examined as witnesses one against another.]

[Toth. 186.]

Administrator. [Said, if an administrator sue, or be sued here; and pending the suit the administration is revoked by his practice, to the end he may be examined as a witness, he shall not be examined.]

[1 Cl. Tut. 17.]

Examination to credit. [If either party is minded to examine to the credit of the other's witnesses, he must, upon exceptions filed,

filed, have an order for so doing, which is sparingly to be granted, &c.] [Or. Ch. 105.]

[The Court, on motion, denied to order the defendant to discover the names of witnesses to a deed, whereby he claimed, &c. which the plaintiff by his bill charged to be antedated, and which the defendant denied was; for that might tend to tampering the witnesses. But the Court said, if there had been apparent suspicion, there might have been reason upon such order.] [2 Ch. Ca. 84.]

Discovery of the names of witnesses to a deed.

[Upon a commission to prove customs, parties interested shall not be examined.]

Interested parties. [Toth. 39]

[A counsellor in the cause, or his clerk, are not to be examined as witnesses] unless he consent.

Counsellor. [Toth. 48.]

[A solicitor or promoter of the suit is not to be examined as a witness.]

2 Vez. 447. Solicitor. [Toth. 117.]

[One being served with a *subpœna ad testificandu'*. Upon shewing to the Court by affidavit that he was solicitor in the cause, was discharged of the *subpœna*, with an order that he should not be examined.] [Ca. Rep. 81.]

[But in a like case, where one had been of counsel or solicitor for the defendant in the matter, it was (I think more equitably) ordered, that he should not be examined on any interrogatories which might compel him to answer any matter which came to his knowledge as counsellor or solicitor in this case; but for any other matter the plaintiff might examine him.] [Pr. H. Ch. 121.]

[The rule in these seems to be; *they* shall not be compelled, nor ought, to be examined to the secrets of the client's causes, or what they come to the knowledge of as counsel, &c.] [Ca. Rep. 127.]

[The complainant's attorney at common law was ordered to be examined touching the breaking off a seal from an indenture; but not to any thing touching his client's title.] [Pr. H. Ch. 148.]

Where the Master examined one witness three times to the matter of account, the examination was suppressed.

Examination. Ch. Ca. 79.

A co-plaintiff cannot be examined as a witness; but a plaintiff is a good witness to prove a contempt.

1 Vern. 230. 2 Ch. Ca 80. 2 Ch. Rep 32. 3 Ch. Rep 29. 1 P. W. 596.

New witnesses may be examined upon a bill of revivor.

Revivor. 2 Ch. Ca. 81.

A witness demurred to an interrogatory, because he claimed interest in the land, and disallowed, because he did not state what interest.

Demurrer to interrogatories 2 Ch. Ca. 208.

If

Compelling witness to be examined.
3 Ch. Rep. 65.

If a witness will not appear and be examined upon the return of a *subpœna*, the party may take an attachment against such witness, and if he be examined on the other side, suppress his deposition.

Deeds.
3 Ch. Rep. 91.

The contents of deeds cannot be proved by witnesses.

Umpire.
1 Vern. 159.

An umpire has been examined as a witness.

Commissioner.
1 Vern. 369.

A commissioner may be a witness, but he must be examined first.

Defendant.
3 P. W. 288.
1 Vern. 452.

Although it be an order of course to examine defendant *de bene esse*, saving just exceptions, yet when the cause is heard, and it appears that such defendant is a party interested, it is proper to shew cause against such order before the witnesses be examined.

Parishioners.
2 Vern. 317.
1 P. W. 600.

Where there is a dispute touching money given to parishioners, the inhabitants of the parish cannot be examined.

Interested person.
2 Vern. 375.

A. and *B.* claiming each of them a rent-charge out of the land, by the same deed, *B.* cannot be a witness for *A.*'s title to his rent-charge, being a party interested.

Interested person.
2 Vern. 464.

An interested person ought not to be examined, and advantage may be taken of it upon a re-hearing, and of perjury also.

Publication.
2 Vern 464.

After publication you may examine to the credit, as well as to the competency of a witness.

Interested person.
2 Vern. 472. 699.
1 P. W. 288.
2 Vez. 42.
2 Vern. 700.
2 Atk. 615.

A witness was examined before hearing, whilst interested, after hearing she released her interest, and was examined again before the Master.—Where he was disinterested when examined, his examination shall be read, though he be then interested, and plaintiff in the cause, as where the obligee makes the only living witness to a bond executor, he shall prove the hand-writing of deceased witness.

Bankrupt.
2 Vern. 637.
1 P. W. 611.
2 Vez. 42.

A bankrupt having released or assigned all his effects to his assignees may be examined as a witness for them, and touching his bankruptcy by statute 5 *Geo.* 1. and his wife as to the discovery of his effects.

Trustee.
3 P. W. 182.
Amb. 272. 393. 592.
2 Atk. 229. 2 P. W. 29.

A bare trustee is a good witness for his *cestui que trust*, but not an executor in trust, as he is liable to be sued by creditors, and to pay costs.

One witness.
1 Vez. 66 97. 125.
2 Atk. 19.
3 Atk. 270. 407. 649. 1 Bro. 52. 3 Vez. jun. 170.

One witness is not sufficient to contradict the answer, if the answer swear positively, unless the evidence be corroborated by circumstances.

One

One merely a witness cannot be made a defendant to discover what he is examinable to, unless interested. Defendant. 1 Ves. 426.

A party may be examined on new interrogatories *before a Master* without an order. 2 Ves. 271.

In general, a witness to be examined *de bene esse* must be 70 years old, but where all the parties lived abroad and the witness was afflicted with the gravel, he was examined though only 60. So if the only witness to the fact. Examination de bene esse. Amb. 65. 2 Bro. 641. 3 Bro. 157. 3 P. W. 77.

A witness may be examined during the hearing or after an adjournment to prove a deed *vivâ voce*. *Vivâ voce.* Amb. 145.

It being doubtful whether a witness was interested or not, an issue was directed to try the fact. A witness good who cannot recover in the suit. Persons interested. 3 Bro. 228. 1 Ves. jun. 61.

Plaintiff, a trustee, in a bill for the directions of the Court, may be examined for one of the defendants. Trustee. Amb. 393.

Trustee ordered to account, shall not be examined as a witness in that cause. Barn. 416.

One *defendant* cannot move to strike another defendant out of the bill, who hath never been served with process, in order to make him a witness, but plaintiff may; and a defendant may have an order to examine such late defendant, saving just exceptions. Gilb. 139.

A person added as a defendant may re-examine the witnesses who were examined before he was made a defendant, and also examine such new witnesses as he may think fit. Barn. 361.

Defendant was examined as a witness for plaintiff in a matter respecting which he was not interested, and the plaintiff had a decree against him for other matters. Amb. 583.

Particeps criminis not a witness to disprove a fraud. Particeps criminis. Amb. 594.

Witness may be cross-examined to the point to which he is produced, but not to any other matter. Cross-examination.

Cross-examining a witness by one side in any matter tending to the merits, makes him a good witness for the other side. 2 Atk. 41. 1 Vern. 254.

Death of an attesting witness to a deed must be proved: where he has lived abroad strict proof is required, otherwise where he lived constantly in *England*; and it is not necessary in such last case to produce a certificate of his funeral. Death of witness. 2 Atk. 48.

A member of a corporation cannot be a witness on behalf of the corporation: if his evidence be indispensable, he must be disfranchised. Corporation. 1 Vern. 254. 1 P. W. 595.

Where a witness is under the necessity of exculpating herself first, no regard is to be paid to her evidence as to the conduct of others. 2 Atk. 97.

In

In general, the rules of evidence are the same both at law and in equity, except in the cases of fraud and trust.

2 Atk. 229.

Costs.

Where a witness demurred to being examined, and the demurrer was over-ruled, the Court, on motion, ordered him to pay 5 *l.* costs, as a *subpœna* for costs could not in this case issue.

2 Atk. 592.

In a matter which depends upon tradition, ancient persons are admitted as witnesses, and their evidence allowed.

3 Atk. 578.

The Court will not allow articles to be exhibited against the competency of a witness *after publication*, but only to his credit. And *note*, a commission is not granted to foreign parts to support such articles, unless it be *sworn* that there is no person in *England* who can speak to his credit. *Vide supra*, p. 422.

3 Atk. 643.
2 Vern. 464. contra.

WRIT OF ASSISTANCE.

Vide tit. Execution of a Decree.

WHERE a defendant is not taken, but stands out all process of contempt upon a decree, and the Serjeant at Arms certifies that he is not to be found, or being taken by him, is rescued, a sequestration will be granted, and what further process is necessary, as a writ of assistance.

Curr. Can. 368.

Where the decree is for land, and the party remains obstinate in prison, the Court usually grants an injunction for the possession thereof, to be yielded up to the party for whom the decree is; and if this be disobeyed after it is served, and oath made thereof, the Court doth in that case grant a commission to some justices of peace to put the other party in possession.

Ibidem.

And if need be a writ of assistance may be had, which is directed to the sheriff, and commands him to be aiding and assisting (to the justices) in putting the party into possession.

1 Bro. 376.

Order on the tenant in possession to deliver up the premises to a purchaser having been obtained, and the party served with a writ of execution of the order, and an attachment for disobedience of it; and the tenant still refusing to deliver possession, an injunction was moved for and personally served, and upon affidavit of service and of disobedience to the injunction, upon motion, a writ of assistance was granted.

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ERRATA.

Page 16. in marg. *for* 4 Bro. 534. *read* 544
23. ——— under Cross bills *insert* 3 Bro. 489
55. line 10 from bott. *for* replegiendo *read* replegiando
64. —— 4 from bott. *for* &c. *read* Sir
67. —— 14 from bott. *instead of a* semicolon *insert a* comma
94. in marg. *for* 3 P. W. 48. *read* 348
118. line 11 from bott. *dele* order, *and after* without *insert* order
149. —— 9. *for* found *read* fund
178. in marg. at bottom of the page *insert* 3 Bro. 191
181. ——— at top *after* dismission *insert* 3 Bro. 434.
203. line 13 from bott. *for* executing *read* excepting to
257. in marg. *dele* how directed
259. ——— *for* 2 Ves. 100. *read* 106
271. line 4 from bott. *after* annuity *add* 2 Ves. jun. 571. contrà
321. ——— *for* Mosely 58. *read* 68
339. line 4 from bott. *after* run *add* 2 Atk. 31. contrà
—— 7. *for* batchelor *read* bachelor
402. —— 11. *after* service *add* 3 Bro. 386. contrà
415. —— 5 from bott. *for* seems *read* seem
428. —— 1. *dele* answer.
457. *for* replegiendo *read* replegiando

THE END.

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